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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 97

OLGA E. VOELLER, DOROTHY GLOECKNER, NELLIE B. PUGH, ET AL., PETITIONERS,

vs.

THE NEILSTON WAREHOUSE COMPANY AND THE OHIO NATIONAL BANK OF COLUMBUS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED MAY 23, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1940.

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[fol. 1]

IN COMMON PLEAS COURT OF FRANKLIN COUNTY OHIO

OLGA E. VOELLER, 943 Livingston Avenue, Plaintiff,

vs.

THE NEILSTON WAREHOUSE COMPANY, a Corporation, 242 E. Naghten Street, and The Ohio National Bank of Columbus, a Corporation, Town and High Streets, Defendants

[No. 151264]

PETITION—Filed January 14, 1937

Defendant, The Neilston Warehouse Company, is a corporation organized, and at all times herein mentioned existing, under the laws of the State of Ohio with its principal office and place of business in the City of Columbus, Franklin County, Ohio.

The name of said defendant corporation was changed, by amendment of its Articles of Incorporation duly filed in the office of the Secretary of State of Ohio on July 6th, 1927, from The G. W. Bobb Company to The Neilston Warehouse Company.

Plaintiff is, and was at all times herein complained of, the owner and holder of record, upon the books of said defendant corporation, of forty (40) shares of stock of said defendant, which shares are and were at all said times [fol. 2] evidenced by one certificate, to wit: By Certificate No. 532 for forty (40) shares issued in the name of said The G. W. Bobb Company under date of September 2nd, 1919.

On or about May 20th, 1936, the Board of Directors of said defendant corporation, by action taken at a meeting of said Board, unanimously approved the sale of substantially all of the property and assets of said defendant corporation, and thereupon ordered called a special meeting of the shareholders of said defendant corporation for the purpose of procuring authorization by such shareholders, or by a vote of holders of shares entitling them to exercise at least two-thirds (⅔) of the voting power, on such proposed sale, and thereupon such meeting of the sharehold-

ers was called for and held on June 2nd, 1936, at 9:30 o'clock A. M.

At the time of such shareholders' meeting on June 2nd, 1936, the total number of shares of said defendant corporation then issued and outstanding was 5078, 4783 of which were represented at said shareholders' meeting either in person or by proxy, and 3591 of which shares, or more than two-thirds (⅔) of all such shares, were voted in favor of such proposed sale, and ..... of which shares were voted against said sale.

Plaintiff, as the owner and holder of said forty (40) shares of said defendant corporation, attended said meeting on June 2nd, 1936, did not vote in favor of the proposed sale of said property and assets, but instead when, at said meeting, the shareholders were requested to authorize the proposed sale a vote of the shareholders was taken, plaintiff [fol. 3] dissented from and voted against said proposed sale.

On June 1st, 1936, the day before said vote was taken authorizing said action, to wit, the sale of substantially all said property and assets, the fair cash value of plaintiff's said forty (40) shares, excluding from such fair cash value any appreciation or depreciation in consequence of such proposed sale, was $100.00 per share, or a total of $4000.00.

On June 22nd, 1936, and within 20 days after such vote was taken, plaintiff, as such shareholder, objected in writing to the action so taken at such shareholders' meeting, and demanded in writing of said defendant corporation the payment of such fair cash value for her shares.

In such last mentioned objection and demand for the fair cash value of her shares, plaintiff stated the number and kind of shares held by her, as such dissenting shareholder making the demand, and the amount which she as such shareholder claimed as such fair cash value.

Said defendant corporation did not within said 10 days, after receipt by it of plaintiff's such demand, offer in writing to pay an amount as and for such fair cash value.

Within 10 days after the receipt by it of such demand, so made by plaintiff, said defendant corporation in writing informed plaintiff, as such shareholder, that it would not and it refused to pay the amount so demanded by plaintiff.

The shareholders of said corporation did not revoke said [fol. 4] authority to sell, said corporation did not abandon its said purpose to sell, and said corporation did consummate said sale.

On December 2nd, 1936, six (6) months expired since the day, to wit, June 2nd, 1936, on which the vote was taken at said shareholders' meeting, and during such six (6) months period no petition was filed by either said defendant corporation or by this plaintiff to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken, to which objection was made, as aforesaid.

On January 1st, 1937, thirty (30) days expired since the expiration of such previous six (6) months period, but during such thirty (30) day period said defendant corporation did not pay, and it has not yet paid, to plaintiff such determined fair cash value.

After the expiration of such thirty (30) day period, to wit, on January 7th, 1937, plaintiff offered to surrender to said defendant said certificates heretofore described and demanded of said defendant said fair cash value of $100.00 per share for each of the 40 shares so held by plaintiff, or a total of $4000.00, but said defendant refused to pay such amount to plaintiff. On said last mentioned day plaintiff made like offer and demand of and received like refusal from said defendant's Liquidator, as such Liquidator is hereinafter referred to.

Plaintiff has done and performed everything upon her part to be done and performed as such dissenting shareholder and has complied with all conditions of Ohio General Code Section 8623-72 and is by virtue of such compliance [fol. 5] and the facts herein set forth entitled to be paid such total fair cash value, together with interest at six per cent from June 26th, 1936.

The defendant, The Ohio National Bank of Columbus, is a corporation organized and doing business under the National Banking Laws of the United States with its principal office and place of business in the City of Columbus, Franklin County, Ohio.

On or about August 13th, 1936, the Board of Directors of the defendant corporation, The Neilston Warehouse Company, unanimously joined in a resolution to dissolve said corporation and to transfer, and it did thereupon transfer, all of its remaining assets to the defendant, The Ohio National Bank of Columbus as Liquidator, and thereafter said, The Neilston Warehouse Company, through its said Board of Directors, did, on September 15th, 1936, file in the office

of the Secretary of the State of Ohio a Certificate of its dissolution as a corporation.

Wherefore plaintiff prays judgment against the defendant, The Neilston Warehouse Company, and against the defendant, The Ohio National Bank of Columbus, as Liquidator of The Neilston Warehouse Company, for Four Thousand ($4000.00) Dollars, together with interest at 6 per cent from June 26th, 1936, together with the costs of this proceeding, and for all other relief to which plaintiff may be in law or equity entitled.

O. R. Crawfis, Attorney for Plaintiff.

[Duly verified.]

[fol. 6] In Court of Common Pleas of Franklin County

Amended Answer—Filed December 17, 1937

First Defense

Now comes the defendant, The Neilston Warehouse Company, and for its First Defense herein, admits that it was a corporation organized under the laws of the State of Ohio and prior to its dissolution had its principal office and place of business in the City of Columbus, Franklin County, Ohio; that its name was changed by amendment of its Articles of Incorporation filed in the office of the Secretary of State of Ohio on or about July 16, 1927, from The G. W. Bobb Company to The Neilston Warehouse Company; that the plaintiff is and was at the times mentioned in the petition the owner and holder of record on the books of this defendant of 40 shares of stock of this defendant as alleged in her petition; that a meeting of its Board of Directors held on or about May 20, 1936, a special meeting of the shareholders of this defendant was called to be held on June 6, 1936, and a meeting of the shareholders was held on said date; that the total number of shares then issued and outstanding was 5078, of which 4783 were represented at said shareholders' meeting in person or by proxy; that 3591 of such shares, or more than two-thirds of all outstanding shares, were voted in favor of a proposed sale of the company's real estate located at the northwest corner of Naghten and Neilston Streets, Columbus, Ohio, to The Creasey Corporation of Louisville, Kentucky, and 1125 of which shares were voted against such sale; that the plaintiff attended said shareholders' meeting and dissented from

[fol. 7] and voted against said proposed sale; that during the six months period following June 2, 1936, no petition was filed by either this defendant or by the plaintiff the object of which was to determine the fair cash value of the shares owned by the plaintiff as of the day before the vote of the shareholders was taken at said shareholders' meeting; that this defendant has not yet paid to the plaintiff in full the fair cash value of her said shares for the reason that the consideration for said sale was not all cash; that on January 7, 1937, plaintiff offered to surrender to this defendant the certificates covering said 40 shares of stock and demanded that this defendant pay her the sum of $100.00 per share for each of said 40 shares, or a total of $4,000.00 and that this defendant refused to pay such amount to the plaintiff; that The Ohio National Bank of Columbus is a corporation organized and doing business under the National Banking Laws of the United States with its principal place of business in the City of Columbus, Franklin County, Ohio; that on or about August 13, 1936, the Board of Directors of the defendant company adopted a resolution to dissolve the corporation and to transfer, and it did thereafter transfer, all of its assets to the defendant, The Ohio National Bank of Columbus, as Liquidator, and thereafter the defendant, through its proper officers, did on September 15, 1936, file in the office of the Secretary of State of Ohio a certificate of dissolution as a corporation.

Further answering this defendant denies each and every allegation contained in the petition not herein expressly admitted to be true.

[fol. 8] Second Defense

For its Second Defense, this defendant adopts and incorporates as a part hereof the admissions contained in its First Defense as fully and completely as if the same were rewritten herein and avers that the action taken by its shareholders on or about June 2, 1936, did not authorize the sale of all or substantially all of its assets as contemplated by the provisions of Section 8623-65 and Section 8623-72 of the General Code of Ohio.

Third Defense

For its Third Defense, this defendant adopts and incorporates as a part hereof the admissions contained in its

First Defense as fully and completely as if the same were rewritten herein and avers that if the provisions of said Sections 8623-65 and 8623-72 of the General Code of Ohio should be held to be applicable, which this defendant denies, the plaintiff is not entitled to proceed under said Section 8623-72 or to the benefits thereof or to the relief herein demanded, for the reason that the written demand which the plaintiff filed with the defendant within twenty days after the date of the shareholders' meeting did not comply with the requirements of said Section 8623-72 in that it did not state the kind of shares held by her and the amount which she claimed to be the fair cash value of such shares as of the day before the vote was taken authorizing such action.

Fourth Defense

For its Fourth Defense this defendant adopts and incorporates as a part hereof the admissions contained in its [fol. 9] First Defense as fully and completely as if the same were rewritten herein and avers that if the provisions of said Section 8623-65 and Section 8623-72 of the General Code of Ohio should be held to be applicable, which the defendant denies, the plaintiff is not entitled to proceed under said Section 8623-72 or to the benefits thereof or to the relief herein demanded, because the plaintiff failed to bring her action within the six months period following June 2, 1936, as required by said Section 8623-72 and therefore any cause of action which she may have is now barred.

Fifth Defense

For its Fifth Defense this defendant adopts and incorporates as a part hereof the admissions contained in its First Defense as fully and completely as if the same were rewritten herein and avers that if the provisions of Section 8623-65 and Section 8623-72, General Code of Ohio, should be held to be applicable, which the defendant denies, the defendant avers that said Section 8623-72, in so far as it attempts to create and establish a conclusive presumption that the fair cash value of the shares of the dissenting shareholders shall be deemed to have been equal to the amount demanded by such dissenting shareholder who has complied with the provisions of said Section 8623-72, is unconstitutional and void as being in violation of, and contrary to, Section 1 of the Fourteenth Amendment to the

Constitution of the United States in that its effect is to deprive the defendant and its shareholders, who did not dissent from said sale, of their property without due process of law.

[fol. 10] Sixth Defense

For its Sixth Defense this defendant adopts and incorporates as a part hereof the admissions contained in its First Defense as fully and completely as if the same were rewritten herein and avers that if the provisions of Section 8623-65 and Section 8623-72, General Code of Ohio, should be held to be applicable, which the defendant denies, the defendant avers that said Section 8623-72 is unconstitutional and void in that it is in contravention of Sections 1, 2, 5 and 19 of Article I of the Constitution of the State of Ohio in that its effect is to deprive the defendant and those of its said shareholders who did not dissent from said sale of the protection and rights therein guaranteed.

Seventh Defense

For its Seventh Defense this defendant adopts and incorporates as a part hereof the admissions contained in its First Defense as fully and completely as if the same were rewritten herein and avers that if the provisions of Section 8623-65 and Section 8623-72, General Code of Ohio, should be held to be applicable, which the defendant denies, the defendant avers that said Section 8623-72 is unconstitutional and void in that it impairs the obligations and contracts between this defendant and those of its shareholders who dissented from said sale in violation and contravention of Article I, Section 10 of the Constitution of the United States and Article II, Section 28 of the Constitution of the State of Ohio.

Wherefore, this defendant prays that the plaintiff's peti-
[fol. 11] tion may be dismissed and that it may go hence without day and recover its costs herein expended and for such other and further relief to which it may be entitled either at law or in equity.

Krumm & Schwenker, Arnold, Wright, Purpus & Harlor, Attorneys for The Neilston Warehouse Company.

[Duly verified.]

IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY

AMENDED REPLY—Filed February 19, 1938

Reply to Second Defense

Now comes the plaintiff and for reply to the second defense of the amended answer of the defendant, The Neilston Warehouse Company, avers that the action taken by the shareholders of said defendant on June 2, 1936, did authorize a sale of substantially all of its property and assets as contemplated by the provisions of Sections 8623-65 and 8623-72 of the General Code of Ohio.

Reply to Third Defense

Now comes the plaintiff and for reply to the third defense of the amended answer of the defendant, The Neilston Warehouse Company, avers that Sections 8623-65 and 8623-72 of the General Code of Ohio are applicable to the cause of action set forth in plaintiff's petition, and that plaintiff is entitled to proceed under Section 8623-72 and to the benefits thereof, and to the relief demanded in her petition, and that the written demand referred to in plaintiff's petition [fol. 12] as having been served upon said defendant complied with the provisions of said Section 8623-72; and further avers that said defendant corporation had outstanding at said times, to wit, on June 2, 1936, and on June 22, 1936, but one kind of stock; that upon receipt of said written objection and demand said defendant made no objections thereto but refused to comply therewith because it claimed to have abandoned the purpose for which it had incorporated, by reason whereof said defendant acquiesced in the sufficiency of and accepted said written objection and demand and waived any alleged insufficiency thereof and any objections thereto and is estopped from denying any such sufficiency and from raising any such objection.

Reply to Fourth Defense

Now comes the plaintiff and for reply to the fourth defense of the amended answer of the defendant, The Neilston Warehouse Company, avers that the provisions of Sections 8623-65 and 8623-72 of the General Code of Ohio are applicable to the cause of action set forth in plaintiff's peti-

tion, and that plaintiff is entitled to proceed under said Section 8623-72, and to the benefits thereof, and to the relief demanded in her petition, and denies that her said cause of action is barred by virtue of said provisions of said Section 8623-72.

Reply to Fifth Defense

Now comes the plaintiff and for reply to the fifth defense of the amended answer of the defendant, The Neilston Warehouse Company, avers that the provisions of Sections [fol. 13] 8623-65 and 8623-72 of the General Code of Ohio are applicable to the cause of action set forth in plaintiff's petition, and denies that said Section 8623-72 is unconstitutional and void as being in violation of and contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and denies that the effect of said Section 8623-72 is to deprive the defendant and its shareholders, who did not dissent from said sale, of their property without due process of law.

Reply to Sixth Defense

Now comes the plaintiff and for reply to the sixth defense of the amended answer of the defendant, The Neilston Warehouse Company, avers that the provisions of Sections 8623-65 and 8623-72 are applicable to the cause of action set forth in plaintiff's petition, and denies that said Section 8623-72 is unconstitutional and void, and denies that said section is in contravention of Sections 1, 2, 5 and 19 of the Constitution of the State of Ohio, and denies that the effect of said Section 8623-72 is to deprive the said defendant and those of its said shareholders who did not dissent from said sale of the protection and rights therein guaranteed.

Reply to Seventh Defense

Now comes the plaintiff and for reply to the seventh defense of the amended answer of the defendant, The Neilston Warehouse Company, avers that the provisions of Section 8623-65 and 8623-72 of the General Code of Ohio are applicable to the cause of action set forth in plaintiff's petition, and denies that said Section 8623-72 is uncon- [fol. 14] stitutional and void, and denies that said section impairs the obligations and the contracts between said

defendant and those of its shareholders who dissented from said sale, and denies that said Section 8623-72 is in violation and contravention of Article I, Section 10, of the Constitution of the United States and Article II, Section 28 of the Constitution of the State of Ohio.

Further Reply to Fifth, Sixth and Seventh Defenses

Now comes plaintiff and replying further to the fifth, sixth and seventh defenses of the amended answer of the defendant, The Neilston Warehouse Company, avers that said defendant has on several occasions, as hereinafter set forth, availed itself of the benefits provided by the statutes of the State of Ohio covering the conduct and operation of private corporations organized under the laws of Ohio, as those statutes have been amended from time to time since the said defendant corporation was organized and incorporated on August 3, 1903; that on or about June 14, 1927, said corporation called a meeting of its shareholders to consider, among other things, amending its Articles of Incorporation so as to permit changing its common capital stock, which had an original par value of $100.00 per share, to capital stock without nominal or par value; that on June 30, 1927, such shareholders' meeting was held and such proposed changes and amendments were authorized; that on or about July 6, 1927, said corporation filed in the office of the Secretary of State of Ohio a certificate of amendment of its Articles of Incorporation providing [fol. 15] in substance that its common capital stock was changed to capital stock without nominal or par value, and that in place of such outstanding common shares such shares without par value be issued; that thereafter said corporation operated with a capital stock set up in accordance with such amendment and so made all annual Reports to the Tax Commission of Ohio; that the sale of substantially all of its property and assets, referred to in plaintiff's petition, was effected under and by virtue of G. C. 8623-65 of the State of Ohio as in effect at the time of such sale; that on or about August 13, 1936, said corporation named and appointed the defendant, The Ohio National Bank of Columbus, Ohio, as its liquidator and transferred to such liquidator all of its remaining property and assets, and proceeded to and did dissolve and filed in the office of the Secretary of State of Ohio a certification of such dissolution, all as set forth in the petition first filed herein; that

by reason of such acts by said defendant corporation it waived any objection to said Sections 8623-65 or 8623-72 and to the General Corporation Act of Ohio in force and effect at said times and that it is estopped from denying the constitutionality of such act or of any part thereof.

Wherefore this plaintiff prays that the amended answer of the defendant, The Neilston Warehouse Company, be de-
[fol. 16] nied and that plaintiff may be granted the relief prayed for in her petition.

O. R. Crawfis, Counsel for Plaintiff.

[Duly verified.]

(The pleadings in cases numbered 151,265, 151,266, 151,-267, 151,268, and 151,305, are substantially identical with the foregoing except that the plaintiffs allege in their petitions that they own 27, 128, 7, 6, and 80 shares, respectively, and pray judgment for $2,700.00, $12,800.00, $700.00, $600.00, and $4,800.00, respectively.)

In Court of Common Pleas of Franklin County

Motion to Vacate—Filed August 1, 1938

Now comes the plaintiff and moves the court to vacate and set aside the former finding and decision of the Court rendered herein on July —, 1938, and for a new trial for the following reasons:

1. That the finding and decision is in favor of the defendants when it should have been in favor of plaintiff.

2. That the finding and decision is not sustained by the evidence and is contrary to law.

3. Errors of law occurring at the trial and excepted to by the plaintiff.

O. R. Crawfis, Attorney for Plaintiff.

[fol. 17] In Court of Common Pleas of Franklin County

Transcript of Docket and Journal Entries

1937, January 14. Petition filed.

1937, January 14. Motion filed.

1937, January 14. Hearing set for February 20, 1937, etc., as per entry.

1937, January 14. Precipe filed. Summons issued, Sheriff, Franklin County. Returnable January 25, 1937, Answer February 13, 1937.

1937, January 14. Order with copy Petition, Motion and Entry issued Sheriff, Franklin County. Returnable January 25, 1937.

1937, January 14. Order with copy Petition, Motion and Entry issued Sheriff, Franklin County. Returnable January 25, 1937.

1937, February 13. Answer day extended to February 20, 1937, as Entry.

1937, February 19. Answer day extended to March 20, 1937, as Entry.

1937, March 20. Answer of defendants filed.

1937, March 20. Memorandum in Support of Demurrer and Demurrer filed.

1937, April 1. Motion of plaintiff filed.

1937, April 1. Memorandum in support of Plaintiff's Motion filed.

1937, April 8. Motion and memorandum of plaintiff filed.

1937, April 8. Answer Memorandum of Defendant on Plaintiff's Motion to Answer.

1937, April 10. Motion of Defendant filed.

[fol. 18] 1937, April 10. Brief of the Ohio National Bank in support of demurrer filed.

1937, April 10. Intervening Petition of Bertha K. Krusson filed.

1937, April 10. Leave granted Bertha K. Krauss to file intervening petition, as per Entry.

1937, April 15. Memorandum Contra Motion of Plaintiff filed.

1937, April 20. Memorandum in support of Plaintiff's Motion for a rehearing filed by Plaintiff.

1937, April 20. Motion for Rehearing filed by Plaintiff.

1937, April 23. Memorandum Contra Motion for Rehearing filed.

1937, April 30. Demurrer of Defendant Ohio National Bank, overruled, Defendant excepts, as Entry.

1937, April 30. Motion to Strike Intervening Petition from files.

1937, May 4. Memorandum against motion to strike intervening petition from the files.

1937. May 13. Reply Brief on motion to strike intervening petition from files.

1937, July 2. Motion of Plaintiff for order requiring Defendant Neilston Warehouse Company, make answer more definite and certain, sustained, Defendant excepts Motion of Plaintiff for order requiring Defendant to strike from Answer certain matter, sustained, Defendant excepts, Motion of Defendant to strike from files Plaintiff's motion filed April 8, 1937, overruled, Defendant excepts, Motion of Plaintiff for order requiring Defendant to separately [fol. 19] state and number defenses, sustained, Defendant excepts, as per Entry.

1937, July 10. Amended Answer of Defendant filed.

1937, July 24. Motion and Memorandum filed by Plaintiff.

1937, September 15. Memorandum against motion of Plaintiff filed.

1937, October 8. Motion and Memorandum of Defendants filed.

1937, December 14. Motion of Plaintiff to strike amended answer, sustained, Defendant excepts, Motion of Plaintiff for Judgment on pleadings, overruled, Plaintiff excepts, Leave given Defendant to amend amended answer by striking certain words and figures, and refile, as per Entry.

1937, December 17. Amended answer of Defendant refiled.

1938, January 4. Leave given Plaintiff to amend petition by inserting certain words, Defendants except, amended answer of Neilston Warehouse Company be deemed answer as amended, as per Entry.

1938, January 24. Reply of Plaintiff filed.

1938, February 17. Motion of Plaintiff, sustained, Motion for rehearing of intervenor, overruled, Intervening Petition of Bertha K. Krauss, ordered stricken and she is dismissed as party herein, Intervener excepts, as per Entry.

1938, February 19. Amended reply filed.

1938, March 9. Armstrong & Okey appointed Stenographers, as per Entry.

[fol. 20] 1938, March 10. Certificate of Stenographers Armstrong & Okey 4.00 filed.

1938, March 26. Brief on behalf of Defendants.

1938, August 1. Motion of Plaintiff filed.

1938, November 10. Cases #151,265, #151,266, #151,267, #151,268, and #151, 305, consolidated with case #151,264, as per Entry.

1938, November 10. Cause assigned for trial, Jury waived, heard upon amended petitions, answer and replies,

evidence and arguments of Counsel, Court finds Plaintiffs are accordingly not entitled to relief, Plaintiffs except, Plaintiffs' motions for new trials overruled, Plaintiffs except, Amended petitions of Plaintiffs Olga E. Voeller, Dorothea Gloeckner, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler and Maye B. Williams dismissed and that defendants go hence without day and recover their costs, Plaintiffs except, as per Entry.

November 23. Notice of appeal filed.

November 23. Precipe filed for transcript of the docket and journal entries.

November 10, 1938. This cause coming on to be heard upon application, the plaintiff and defendants having consented to consolidate Case No. 151,265 in which Dorothea Gloeckner is plaintiff, Case No. 151,266 in which Nellie B. Pugh is plaintiff, Case No. 151,267 in which Butler C. Bond is plaintiff, Case No. 151,268 in which Antoinette Kessler is plaintiff, and Case No. 151,305 in which Maye B. Williams is plaintiff, all pending in the Common Pleas Court of Franklin County, Ohio, and in all of which The Neilston Warehouse Company and The Ohio National Bank are de-
[fol. 21] fendants, with this Case No. 151,264, upon due consideration thereof it appearing to the court that all said cases may be lawfully consolidated, the court finds said application should be and it is hereby approved.

It is therefore ordered that the said cases numbers 151,265, 151,266, 151,267, 151,268 and 151,305 now pending in the Common Pleas Court of Franklin County, Ohio, be consolidated with, and all further proceedings in said consolidated action be had in and under, this case number 151,264, now pending in this court. Leach, J.

November 10, 1938. This consolidated cause having been regularly assigned for trial, and a jury having been orally waived by the parties in open court, came on to be heard upon the amended petitions, amended answers, amended replies, filed in the several causes consolidated herein, the evidence and arguments of counsel, and the Court being fully advised in the premises finds that the provisions of the seventh paragraph of Section 8623-72 of the General Code of Ohio, in so far as they undertake to create or establish a conclusive presumption as to the fair cash value of shares of dissenting shareholders of a corporation, are, under the facts of this consolidated cause, unconstitutional

and void as being in contravention of the due process clause of Section 1 of the 14th Amendment of the Constitution of the United States, and the plaintiffs are accordingly not entitled to the relief prayed for. To which finding and ruling the plaintiffs except.

This cause also came on to be heard upon the plaintiffs' [fol. 22] motions for new trial and the Court finds the same not to be well taken and accordingly overrules the same. To which ruling the plaintiffs except.

It is accordingly ordered, adjudged and decreed that the amended petitions of the plaintiffs, Olga E. Voeller, Dorothea Gloeckner, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler and Maye B. Williams, be dismissed and that the defendants go hence without day and recover their costs herein, to all of which the plaintiffs except. Leach, J.

[Duly certified.]

[fol. 23] IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY

Bill of Exceptions—Filed December 6, 1938

Be it remembered that on the trial of the above entitled cause at the January Term, A. D. 1938, of the Court of Common Pleas of Franklin County, Ohio, before Hon. Charles A. Leach, Judge, a jury being waived, the plaintiff, to maintain the issues on her part to be maintained, introduced and offered in testimony on her behalf, the following evidence, to wit:

The Court: Jury is waived in numbers 151264, 151265, 151266, 151267, 151268 and 151305.

COLLOQUY

Mr. Wright: Let the record show that the parties appeared and waived a jury trial and agreed to submit these cases to the court, and that the record made in and the submission of these cases, which parties agree may all be submitted together, may be considered and taken to be the record in each case separately.

The Court: The major portion of this record will be common to all cases, but the number of shares differ in each case, and the amount prayed for differs in each case, and

there may be one additional fact in one case that is not common to the other, but I should think that that would be a small part of the whole case, and just have one common record and that one record showing a distinction as to the different cases.

Mr. Wright: We, for the defendant, the Neilston Warehouse Company, agree to what the court has just said in regard to having one record for all of the cases.

Mr. Crawfis: That is agreeable to the plaintiff.

[fol. 24] Mr. Schwenker: It is agreeable to the Ohio National Bank.

The Court: You represent the Ohio National Bank?

Mr. Schwenker: Yes, we are just liquidators.

Mr. Crawfis: In other words, it is agreeable then to both defendants, Neilston Warehouse Company and the Ohio National Bank?

Mr. Schwenker: Yes.

Mr. Crawfis: Let the record show that upon application of the plaintiffs in all six cases just enumerated that leave is given to amend the amended replies by substituting, by adding to the reply to the third defense this allegation: "That upon receipt of such written objection and demand, said defendant made no objection thereto but refused to comply therewith because it claimed to have abandoned the purpose for which it had incorporated, by reason whereof said defendant acquiesced in the sufficiency of and accepted said written objection and demand and waived any alleged insufficiency thereof and any objections thereto and is estopped from denying any such deficiency and from raising any such objection. And that this amendment may be made to the amended reply by substituting a page containing this amendment for the first page of the amended reply."

[fol. 25] Wednesday Morning Session, March 9th, 1938.

George Edge, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Crawfis:

Q. You are George Edge?

A. Yes, sir.

Q. You are Secretary of the Tax Commission of Ohio?

A. Yes.

Q. As such do you have in your possession the annual reports made by the Neilston Warehouse Company for the years 1932 to 1936 inclusive?

A. Yes.

Q. Do you have them with you?

A. Yes, I have them with me.

Mr. Crawfis: Do you have any objection to these being introduced in evidence?

Mr. Wright: We would like to see them first.

Q. Do you have any objection to leaving these in the possession of the court?

A. No, all we ask——

Mr. Wright: What is the importance of these?

Mr. Crawfis: They show that the corporation had but one kind of stock.

Mr. Wright: Is that the only purpose of this?

Mr. Crawfis: Yes.

Mr. Wright: Then we admit it.

Mr. Crawfis: This goes back to 1932, one of them. That you have probably is 1936.

Mr. Wright: They did have preferred stock which was all retired long before this action occurred and whatever the facts are with respect to that, the corporation records show, and we are willing to admit.

[fol. 26] The Court: Well, may it not be admitted that for all the purposes of this case and during all the period covered by this case that there is just one class of stock, namely, common stock?

Mr. Wright: No, because we want to show the retirement of the preferred. Now, the last of the preferred was retired in 1930, and we admit that the preferred was retired at that time, and after that there was only one class of stock and that was common.

The Court: Now, that takes place of proof and is proof.

Mr. Crawfis: Now, however, we want the record to show that of these reports produced, that during all these years of 1932 to 1936, inclusive, the corporation in making its return to the Tax Commission of Ohio, its annual report to the Tax Commission of Ohio, showed only the one kind of stock outstanding.

The Court: All right.

Mr. Crawfis: Now with that, there is no necessity of introducing it if you agree that that is what the record from the Tax Commission showed.

Mr. Wright: We not only agree that that is what the record from the Tax Commission shows, but there was only one class of stock, as I have said before.

[fol. 27] And also CHARLES F. LORAH, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Crawfis:

Q. Your name is Charles F. Lorah?

A. Yes.

Q. You are a Deputy, are you employed in the office of the Secretary of State?

A. Assistant Cashier.

Q. As such, do you have in your possession the records with reference to the Neilston Warehouse Company and the G. W. Bobb Company?

A. I do, yes, these are the original papers.

Q. I will ask you to refer to your records, and tell us whether there was filed in the Office of the Secretary of State by the G. W. Bobb Company any form changing its name to the Neilston Warehouse Company?

Mr. Wright: That is admitted.

Mr. Crawfis: All right.

Q. Will you refer to your records, Mr. Lorah and tell us when the name of the G. W. Bobb Company was changed to the Neilston Warehouse Company?

A. July 16, 1927.

Mr. Crawfis: It was filed in the office of the Secretary of State, that is according to your allegation?

The Witness: July 6?

Mr. Wright: Yes.

Mr. Crawfis: And it is agreed then that it was filed on July 6?

Mr. Wright: Admitted.

Q. Now, will you refer to that—I think we better intro-
[fol. 28] duce this evidence or read from it, which may be sufficient.

The Court: Your allegation as made in your petition is admitted.

Mr. Crawfis: Well, that part of it. But you get two things in this now, especially this, that the amendment shows that this corporation acted under the New Corporation Act, the General Corporation Act. This will show that they changed their common stock which had a par value of $100.00 per share to no par value stock, which was never permitted in Ohio previous to 1927; that immediately after this law was enacted, this General Corporation Act was adopted, The G. W. Bobb Company changed its name and at the same time changed its common stock to no par value stock. That in our opinion is a waiver of any objection to the new Act, in other words, they began then operating under the new Act.

The Court: Well, all right.

Mr. Wright: Of course, the pleadings admit that there is no question about the fact that that was done.

Mr. Crawfis: You haven't admitted yet that you changed your stock at that time from par value stock to a no par value stock.

Mr. Wright: Well, then, we now admit it.

Mr. Crawfis: Well, the corporation does now admit, and when you speak, as I understand, you attorneys are speaking on behalf of the Ohio National Bank also?

Mr. Wright: Both of us.

Mr. Crawfis: Let the record show then that under date of July 6, 1927, there was filed in the office of the Secretary [fol. 29] of State amendment to the Articles of Incorporation of the G. W. Bobb Company, changing its name to The Neilston Warehouse Company and at the same time changing its common stock from 8,000 shares of a par value of $100.00 per share to 8,000 shares without nominal or par value.

Q. Now, will you refer further to your records and especially to a paper that is marked a certificate of dissolution of the Neilston Warehouse Company and tell us if such a certificate was filed by the Neilston Warehouse Company in your office?

A. It was filed on September 15, 1936.

Mr. Wright: We admit that.

Mr. Wright: In our answer we admit the allegation which they make, namely, that the Neilston Warehouse Company, through its proper officers, did on September 15, 1936, file with the Secretary of State a certificate of dissolution, no issue in this case on that.

Mr. Crawfis: Now, I wish to introduce this particular certificate because it shows in itself the name "liquidator" and no liquidator was ever provided for under the laws they claim applicable to them.

Mr. Wright: That is a conclusion.

The Court: Is that something they filed?

Mr. Crawfis: It is something they filed, and it is so signed by six members of the Board of Directors.

The Court: All right.

Mr. Crawfis: Now, do you wish us to read in from this or do you want, are you willing to merely read from this having been identified as a certificate of dissolution?

Mr. Wright: What are you going to read?

[fol. 30] Mr. Crawfis: If there is no objection here we will read into this record as evidence in place of leaving the original certificate.

Mr. Wright: We object to this exhibit or this evidence as being immaterial and irrelevant, under this issue of this case, which has already been admitted.

The Court: When you make an allegation and they admit it by their answer, is not that all there is to it?

Mr. Crawfis: Of course, we have, we think, steps that we have to show they have taken.

Mr. Schwenker: We had admitted it, so you don't have to show it.

Mr. Crawfis: Steps they have taken in order to show their waiver, otherwise, they might claim they are objectionable features of the statute.

Mr. Wright: We admit the steps.

The Court: You make an allegation and they say yes, that is true, we did just that.

Mr. Crawfis: You understand part of our allegations, in fact, all of these allegations in reference to waiver, are in our reply which they have not admitted.

The Court: I know, but the allegation of fact is the filing of the certificate of dissolution, is it not?

Mr. Schwenker: And the name of the liquidator which we admit.

Mr. Crawfis: They admit that a liquidator was named. They did not admit, of course, that they did those things under the old law or the new law. I do not see any objection to the fact that we introduced in evidence here the certificate showing that having disposed of all of its assets [fol. 31] to the Ohio National Bank of Columbus, Trust Department, as liquidator, and having resolved to dissolve, that said company surrenders its charter, the directors of the company are hereby authorized and directed to file in the office of the Secretary of State a certificate verified by their oaths stating that fact.

Mr. Wright: We admit that.

Mr. Crawfis: Well, do you admit this certificate shows that, filed in the office of the Secretary of State?

Mr. Wright: Yes.

Mr. Crawfis: Well, then, that is all. I have subpoenaed Mr. John Blampied to produce the records and I have also subpoenaed Mr. Bobb to produce the records.

Mr. Schwenker: We have all that except the stock register which Mr. Blampied has, he was going to call you and would come whenever you wanted him.

Mr. Crawfis: There is another thing I want to show by him, that is a tender of that money and the tender of the certificates.

Mr. Schwenker: There is no dispute about tendering.

Mr. Crawfis: As I analyzed, some of those things which you fellows think are not in dispute, I did not think you completely admitted.

The Court: Well, they do now.

Mr. Crawfis: Then do you now admit that on September 22, 1936, plaintiff, Antoinette Kessler, tendered back to the corporation and to the liquidator the $30.00 in cash?

Mr. Wright: If Miss Kessler is here I suppose she can testify to that.

Mr. Crawfis: That is true, we are prepared to prove it. And also

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[fol. 32] William H. Hawk, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Crawfis, as upon cross-examination.

Q. You are William H. Hawk?

A. Yes.

Q. You are Secretary of the Neilston Warehouse Company?

A. Yes.

Q. From what time, Mr. Hawk, when did you become secretary?

A. From the time of the inception of it in 1927 I believe when the name was changed.

Q. And then you as secretary are familiar with the corporation record, that is the minutes of the stockholders' meeting and the directors' meeting?

A. I should be.

Q. When you say, "I should be," that means you kept them yourself?

A. Yes.

Q. I ask you to take that book and tell me whether that is the last corporation record or record of proceedings of the shareholders?

A. Yes.

Q. Now, then, if you direct your attention to the minutes of a meeting of the Board of Directors held June 14, 1927, refreshing your recollection from the minutes of your meeting of the Board of Directors of the Neilston Warehouse Company of June 14, 1927, do they show the authority and resolution of the Board of Directors to change the common stock which had a par value of $100.00 per share to no par value stock.

Mr. Wright: Object, we do not see how that is material. He has admitted that that has been done, presumed to have been done by authority of the corporation.

[fol. 33] The Court: No question is made as to the validity of the change from par value stock to no par value stock, you make no objection of any sort or kind in relation thereto.

Mr. Crawfis: Only this, they claim that they are acting under the laws that existed at the time they incorporated.

Mr. Wright: No, that would be a conclusion.

The Court: They admit that at that time, acting under the authority of the Board of Directors, they did make that change from par stock to no par stock.

Mr. Wright: That is right.

Mr. Crawfis: In other words, do you admit then that a shareholders' meeting was held then following that on June 30, 1927, when that action, proposed action, was approved

by the proper vote to amend the Articles of Incorporation changing the stock. Do you admit that?

Mr. Wright: Yes.

Mr. Crawfis: And you admit an amendment was filed then in the Secretary of State's office on July, 1927?

Mr. Wright: We admit that here in the pleadings.

Q. Will you refer to the minutes of your directors' meeting held May 20, 1936, do you find them?

A. I find them.

Q. Let me ask you if it is not a fact now that the records of the corporation, the minutes, show or contain the minutes of a directors' meeting held May 20, 1936?

A. Yes.

Q. And those minutes do show a resolution to sell the real estate, all the real estate of the corporation to the Creasy Corporation.

[fol. 34] Mr. Wright: Object.

Witness: Yes.

Q. I will ask you if you did not send out a letter then to the stockholders on May 21, 1936, calling for a special meeting of the shareholders to consider the question of approval or disapproval of the action taken by the Board of Directors to the sale of the real estate?

A. There was a letter mailed.

Q. I show you this and ask you if this is not one, a letter dated May 21, 1936, if that was not one of the letters that was sent out to the shareholders?

A. That is one of them.

Q. And whether you did not state in this that the action taken at the meeting by the Board of Directors, at this meeting on May 20, unanimously approved the offer and it called for a special meeting of the shareholders to be held June 2 at nine o'clock a. m., 1936?

A. Yes.

Q. Now, then, coming to your minutes of your meeting of June 2, 1936, I will ask you if those minutes do not show that the plaintiff, the six plaintiffs in these six cases here, that is, Olga E. Voeller, Dorothy Gloeckner, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler and May B. Williams, were all present at that meeting and voted against the proposed sale of the real estate.

Mr. Wright: We admit that in the pleadings, and if necessary, we admit it again.

Mr. Crawfis: All right.

Q. I will ask you if those records do not show that you represented——

[fol. 35] Mr. Wright: The pleadings cover that fully, you allege, how many were there and how many voted for it and how many voted against it, and we admit it.

Mr. Crawfis: I think that is right.

Q. I will ask you to refer to your minutes of your directors' meeting, held June 16, 1936, and ask you if they do not show that all of the physical assets of the corporation which remained except a portable elevator was sold for $401.50?

A. No, the records do not show that.

Q. What do the records show with reference to the balance of the sale of the physical assets?

A. It shows an authorization to sell certain items for the sum of $401.50.

Q. Just name what?

A. 26 trucks, two skids, five desks, four typewriters, one adding machine, one safe, one check writer, five desk lamps, four chairs, one fan, 48 fire extinguishers and a lot of stationery, clips, files and so forth.

Q. Now, what other physical assets did you have left after having sold those, if you recall?

A. We had a portable elevator.

Q. Do you recall anything else?

A. I do not just recall anything else unless it would be something very small.

Mr. Wright: By "physical," you mean tangible, personal property?

Mr. Crawfis: Yes, I mean tangible personal property.

Q. Referring to your record, did you have another meeting of your Board of Directors in August?

A. We had a meeting on August 13, 1936.

[fol. 36] Q. Now, at that time had you disposed of the rest of the physical assets or the tangible assets, of the corporation, refreshing your recollection from the minutes?

A. The minutes do not show.

Q. Well, I will ask you if you recall then that when you

filed a certificate of dissolution in the office of the Secretary of State on the thirteenth of September, 1936, you stated that you had disposed of all your assets?

The Witness: Yes.

Q. In other words, when you filed that in the office of the Secretary of State, all physical assets had been sold.

Mr. Schwenker: He didn't say that, you said transferred all certificates to liquidator, that is what you said?

Mr. Crawfis: I think I said having disposed of all its property.

Q. Do you recall what was received by the corporation for the balance of those physical or tangible assets after you had sold off $401.50, the items which you enumerated, and had left the portable elevator and something else?

A. Portable elevator is $180.00, I believe.

Q. Do you recall now whether there was any other physical or tangible asset?

A. It might have been a few items, possibly about $25.00, miscellaneous items.

Q. So the total amount then for which you sold the remaining physical assets, after you sold the real estate, was approximately $600.00?

A. Well, there was one other item that we sold for $50.00, an automobile.

Q. And that would make approximately $675.00 then for all their physical assets?

A. Yes.

Q. Now, Mr. Hawk, whatever assets you did have after [fol. 37] having sold that chattel property, that is the physical or tangible assets, I take it consisted of the money that was owing by the Creasey Corporation and whatever cash you had on hand or in the bank?

A. And a few accounts receivable.

Q. What did those accounts receivable amount to at that time?

A. At what date was that?

Q. At the time you made the transfer to the liquidator, at the time the corporation transferred to the liquidator?

A. I don't recall the exact amount, but I do not have that.

Q. Now, I will ask you, Mr. Hawk, why the corporation transferred the remaining assets to the liquidator?

Mr. Wright: Object, I do not see how that is material here.

Q. Well, there is a question of whether they had sold all, or substantially all, of their assets.

Mr. Wright: The fact is that they had sold all of their tangible assets.

Q. Now, I am asking this witness why they did that? I want to know why the corporation transferred their assets to a liquidator. Was it because you had sold substantially all of your property?

Mr. Wright: Object.

The Court: That calls for a conclusion. The facts may speak for themselves. They had sold this property to the Creasey Corporation, that is, the real property, as I understand it.

Mr. Crawfis: That is right.

The Court: And then Mr. Hawk relates the sale of these [fol. 38] miscellaneous items here and then there was turned over to the liquidator the unpaid notes and the mortgage securing the same, from the sale of the real estate, anything else?

A. Accounts receivable.

The Court: Amounting to about what?

The Witness: I think they were in the neighborhood of about $200.00.

The Court: Anything else turned over to the liquidator?

The Witness: And cash.

The Court: How much?

The Witness: I do not have that record of how much it was, it was all the cash we had on hand.

The Court: All the cash you had on hand at that time?

The Witness: Yes, all cash in the bank, on hand, here is the receipt that I received from the liquidator on September 10 note and mortgage in the sum of $102,950.00, given by the Creasey Corporation of Louisville to the Neilston Warehouse Company; accounts receivable in the sum of $233.37; check on the Huntington National Bank, $568.79, and a check on the Ohio National Bank for $259.31, and a check on the Ohio National Bank for $4,164.94.

Q. Now, the balance of the articles are the books——

A. Four books of issued common stock certificates of the G. W. Bobb Company; nine books issued common stock certificates of the G. W. Bobb Company; one book issued

common stock certificates of the Neilston Warehouse Company; five books issued preferred stock certificates of the [fol. 39] G. W. Bobb Company; one minute book, August 3, 1903, to January 21, 1913; one minute book September 12, 1913, to January 24, 1925; one minute book February 3, 1923, to August 13, 1930; one stock ledger; one stock register of transfers. Then again on October 29 it turned over to the liquidator——

Q. Now, those are part of the same accounts receivable to which you have referred *to* in the other statement?

A. This is the cash that I had collected and turned over to the liquidator, being cash collected on accounts receivable that I previously turned over to the liquidator.

The Court: That is, you made the collection for them.
The Witness: Yes.

Q. And then turned the money over to them?
The Witness: Yes.

The Court: That is not material here.

Q. Now, I will ask you if it is not a fact you named a liquidator under the Corporation Laws of Ohio.

Mr. Wright: Object.
The Court: Sustained, that calls for a legal conclusion. You are asking him to state what the law was.
Mr. Crawfis: No, I am asking him to state what they attempted to do, whether they attempted to act under all laws that existed then or under previous laws.
The Court: State what they did.
Mr. Crawfis: Well, that is what I am asking him or trying to ask him anyway.

Q. Is it not a fact that your corporation assumed to act under the laws as existing at the time you took the action in August, 1936, when you turned all of your assets over to the Ohio National Bank?

[fol. 40] Mr. Wright: Object.
The Court: Sustained. What they did is what they did, you are still calling for a legal conclusion and a legal interpretation.
Mr. Crawfis: No, I am asking them what they meant to do at that time.

The Court: You are asking them the operation of the mind, and it is controlled by the facts that are shown and everything that was done is competent.

Mr. Crawfis: Note an exception.

Q. I will ask you if it is not a fact that you were familiar with the laws, had read the laws applicable to the sale of all your property, and especially I am referring to General Code Section 8623-65?

Mr. Wright: Object.

Q. I will ask you if you have not read that section and if this sale of the real estate was not made in accordance with that section, or if you didn't attempt to.

Mr. Wright: Object, some reason.

The Court: Yes, Mr. Crawfis, you are calling for a legal conclusion now.

Mr. Crawfis: Save our exception.

Q. You are a lawyer?

A. I practiced law at one time.

Mr. Wright: This witness was called for cross examination.

Mr. Crawfis: Let the record show that if this witness were permitted to answer on cross examination he would admit that the corporation was familiar with——

Mr. Schwenker: That the corporation was, or he was?

Mr. Crawfis: That the corporation was, through its of-
[fol. 41] ficers, familiar with General Code Section 8623-65 and that when it passed a resolution to sell its real estate to the Creasey Corporation it was attempting to act under the law as then existed.

Mr. Wright: I move to strike that from the record, as the proffered answer was improper, and in the second place the answer was framed and advised by plaintiff's counsel without any conference with the witness, and we don't know that that would have been his answer.

The Court: Sustained, the record may appear, however, just as it is, and your objection and my sustaining the objection.

Mr. Crawfis: My objection to the court striking it from the record.

The Court: Physically it will remain.

Mr. Crawfis: Let the record show further that if, under cross examination, if this witness would be permitted or required to answer——

Mr. Wright: There is no question before him now, is there?

Mr. Crawfis: I had not finished my dictation, I had asked several questions and the court sustained the objection to them.

Q. Let me ask this question before I go any further. I will ask you if at a meeting of the Board of Directors, held on June 16th, 1936, it was not reported that under the laws then existing a liquidator could be appointed to wind up the affairs of the corporation, or substantially?

A. I can answer it this way. On this meeting Mr. Krumm stated he was informed that a liquidator could be appointed [fol. 42] to liquidate the affairs of the company which would be a saving of the money for the company.

Q. Who was the Mr. Krumm referred to?

A. Alex Krumm.

Q. He was a member of the Board of Directors, I believe?

A. He was a member of the Board of Directors.

Q. Now, do those minutes—I will ask you if it is not a fact that those minutes show that Ross was on that Board of Directors, Stanley Ross asked Mr. Krumm to look into that question about naming of a liquidator?

A. Yes.

Q. I will ask you if it is not a fact that the corporation then through its officers did investigate the question of the naming of a liquidator to wind up the affairs of the corporation?

Mr. Wright: If he knows:

The Witness: I don't know personally how much investigation was made.

Q. What was done with reference to it?

A. It was referred to Mr. Alex Krumm.

Q. That is he is the one that made the investigation referred to so far as you know?

A. Yes.

Q. What reason did the corporation have for attempting to dissolve or make a voluntary dissolution?

Mr. Wright: Object, he can not speak for the corporation, and the corporation records speak for themselves.

Mr. Crawfis: He is an officer of the corporation, I don't know why he can not, he was Secretary and kept its records and if he can not I don't know anyone that can.

[fol. 43] The Court: Well, he can from the record, but not personally, not his personal or private notion.. If there is anything of record, all right.

The Witness: Read the question please.

(Question read.)

Mr. Arnold: That has been confined to the records.

A. Well, I don't know just exactly.

Mr. Wright: Confine your answer to what the record shows.

A. The minutes of a directors' meeting on August 13th, 1936, on motion recites this: "On motion duly made and seconded it was resolved that the Neilston Warehouse Company do hereby appoint the Ohio National Bank of Ohio, Trust Department, liquidators as provided in Section 8623-83-84 of the General Code of Ohio, and that the President and Secretary be and they are hereby authorized for and on behalf of this company to assign all assets of the company consisting of the following"—and this gives a list of the assets.

The Court: They did dissolve?

Q. Well, is there something else you find there, Mr. Hawk, on that?

A. No, that covers the—here the minutes of this directors' meeting of August 13th further says on motion duly made and seconded it was unanimously resolved that as soon as the President and Secretary for and on behalf of this company has assigned all the assets of the Neilston Warehouse Company to the Ohio National Bank of Columbus, Trust Department, as liquidator, that the Neilston Warehouse Company dissolve and surrender its charter and that the [fol. 44] directors file in the office of the Secretary of State a certificate verified with their oath stating that fact, and that they elect to dissolve the corporation.

The Court: And we will now suspend until 1:30.

And thereupon a recess was taken until 1:30, same day, to wit, March 9th, 1938.

Wednesday Afternoon Session, March 9th, 1938

And also, WILLIAM H. HAWK, resuming the stand for further cross examination, continued his testimony as follows:

Cross-examined by Mr. Crawfis:

Q. Now, in order to get into the record the complete facts, I will ask you if it is not a fact that the corporation did name a liquidator under General Code Section 8623-83 and 8623-84?

Mr. Wright: Object, conclusion.
The Court: Sustained.
Mr. Crawfis: Note an exception and let the record show that if the witness were permitted to answer he would admit under cross examination that the corporation did act under General Code Section 8623-83 and 84.
Mr. Wright: I move to strike it from the record on the ground it is improper as the witness was called for cross examination; second, that answer was made by plaintiff's counsel not knowing that that would have been the answer of the witness.
The Court: Sustained.
Mr. Crawfis: Note an exception.
Mr. Crawfis: Well, if that is sustained on the ground, [fol. 45] I mean my stating the evidence, then I will ask the witness to read it into the record. What are the facts, Mr. Hawk?
The Court: Objection sustained, because it calls for a legal conclusion.
You have shown what the resolution was, you have shown that a liquidator was appointed, now you are asking for a legal construction.

Q. Is it not a fact that at that meeting of the Board of Directors you discussed that Section 8623-84, Mr. Hawk?

Mr. Wright: Object.
The Court: Sustained.
Mr. Crawfis: Note an exception.

Q. Mr. Hawk, do you have—I want to go back to a question there that we had awhile ago as to why the corporation did name a liquidator?

Mr. Wright: Object to the question.
The Court: I think we went all over that once.

Q. You were a member of the Board of Directors, were you not, Mr. Hawk?
A. Yes.
Q. (Continuing) During the time, the years that you were secretary of the corporation?
A. That is right.

Mr. Crawfis: All right. Note an exception to the court's ruling in refusing to permit the witness to answer as to why they named a liquidator for the defendant corporation.

(Previous question read.)

The Court: Objection sustained.
Mr. Crawfis: This will be marked proffer, if permitted to answer the witness would say——
[fol. 46] The Witness: We are discontinuing the warehouse and business and that the bank as liquidator could handle the funds cheaper than the handling through other methods as the bank, I believe, agreed to handle the funds for one per cent., receive the sums and distribute them.

Q. Why was the warehouse, the Neilston Warehouse Company discontinued, the warehouse business then?

Mr. Wright: Object, not material.
The Court: Sustained, same ruling and same method of procedure.

A. The answer, you want a proffered answer, we have no building to operate in and it was necessary to have a building to operate warehouses.

Q. Of course, you didn't have a building because you just got through selling your building, is that right?
A. Yes.
Q. So all it leads back to the fact that you had disposed of your real estate?
A. That is right.
Q. And that brings us now to your record. You were asked to bring in a statement showing the assets of the Neilston Warehouse Company as of May 31st or June 1st, were you not, as a matter of fact as of June 1st, 1936. You have such statement with you?

A. I have a copy of the statement here. I have a copy of the close of business May 31st.

Q. Well, let me ask you then if that would be the same as of the opening of business on June 1st, 1936?

A. Yes.

Q. All right. What was the value, the total value of all assets as of that time?

A. According to our balance sheet it was $378,020.17.

[fol. 47] Mr. Wright: I move to strike out the answer as not being responsive, and this witness has not been qualified to testify to the value of the assets.

The Court: I take it the question should be amended as to book value?

Q. Yes, the book value of them.

The Court: You may give that.

A. The book value was taken from our book of accounts, the assets are $378,020.17.

Mr. Wright: May I ask the purpose of this question, testimony reflecting upon what issue, what point?

Mr. Crawfis: As to whether you sold substantially all of your assets.

Q. Now what part of that book value, total value of assets is represented by your real estate which was later on or which was sold on the next day, June 2nd to the Creasey Corporation?

A. $353,499.74.

Q. And how much of that, of the balance, the balance of all of your assets were how much, about $21,000.00?

The Court: That is the difference between the total book value and that real estate value as you had it on your books, that is what you mean, is it not?

Mr. Crawfis: That is right.

The Witness: Yes.

Q. Well, approximately what was it?

A. $24,520.43.

Q. Now, of that $24,520 odd dollars, how much of that was represented by treasury stock?

A. $11,318.52.

Q. And that left approximately $13,000.00 for the remaining assets?

A. That left $13,201.91.

Q. Now, what made up that $13,201.91?

[fol. 48] A. The cash in bank, $5,737.37; accounts receivable $2,655.63; prepaid expenses $759.31; fixtures $676.71; delivery equipment $1,561.00; sinking fund for taxes, $1,811.89.

Q. Do you have a copy of that statement there that you could let us have?

(Witness produces paper.)

Q. Have you any objection of introducing this in evidence, copy of financial statement—do you have a duplicate of it?

A. Yes.

The Court: Is there any objection to its introduction?

And thereupon a paper writing was marked Plaintiff's Exhibit No. 1.

And thereupon the paper writing above referred to was offered and introduced in evidence on behalf of plaintiff which exhibit is hereto attached and made a part hereof.

Q. I believe you previously testified as to what the balance of the physical or tangible assets sold for?

A. Yes.

The Court: Those were sold when, they were sold after the real estate was sold?

The Witness: Yes.

The Court: How long after?

The Witness: I think it was about a month, I don't remember just exactly.

Q. You refer to your record, you will see on June 16th, two weeks afterwards the Board of Directors authorized the sale. I believe at that time you already sold $401.50?

A. I think that is right.

Mr. Schwenker: Now, it seems to us if they are going [fol. 49] into value, going to try and determine value they should use one of two methods. He has introduced in evidence a financial statement showing what the fixtures were carried at, equipment, accounts receivable and the

cash and the building. Now, as I take it, he is attempting now to show actual value, sale price determined value of the equipment.

The Court: They can do it both ways, both reflects on it, actual value and book value.

Mr. Crawfis: I have no objection to asking him what the real estate sold for, in other words, we asked him about the other articles, I think that is proper.

Q. What did you sell the real estate for?
A. $196,950.00.

Q. Now, let me ask you this, did the stockholders of the Neilston Warehouse Company ever revoke the action taken on June 2nd by which it authorized the corporation to sell the real estate to the Creasy Corporation?

Mr. Wright: That is admitted in the answer, or we do admit it now if it is not.

The Court: That they did not?

Mr. Wright: That they did not.

Q. Let me ask you whether the corporation ever abandoned the contemplated sale, in other words, did it abandon the purpose?

Mr. Wright: That is admitted, completed the sale and got the money.

Q. In other words, how about that third item there; did the shareholder ever withdraw the notice and demand, I mean did Mrs. Voeller, or either of these six plaintiffs [fol. 50] here ever withdraw the objection, the written objection which they had filed to the sale?
A. Not to my knowledge.

Mr. Wright: There is no dispute about it, they did not.
Mr. Crawfis: They did not. All right.

Q. And the corporation did consummate the sale?
A. Yes.

Mr. Crawfis: I understand then it is admitted here that the shareholders did not at any time after that meeting on June 2nd, 1936, revoke the authority which was then given to the corporation of selling the real estate to the Creasy Corporation and the corporation did not thereafter abandon its purpose to sell and that the dissenting

shareholders, the plaintiffs in these cases, did not at any time thereafter withdraw their notice and their demands.

The Court: That I understand is correct.

And thereupon paper writings were marked Plaintiff's Exhibit No. 2—

The Court: Are those the plaintiff's shares?

Mr. Crawfis: Yes.

The Court: I think you better keep those in your possession, and I will have them down here in court, it certainly can be agreed what their shareholdings are.

Mr. Wright: It is all admitted in the answer.

The Court: May it not be stipulated and agreed——

Mr. Wright: That is admitted in the answer.

Mr. Crawfis: What you did not admit was the number of the certificate, and that it was in the name of the G. W. Bobb Company or the date of it.

[fol. 51] Mr. Wright: The only reason we did not admit it was because you did not allege it in your petition—we admit those.

The Court: Admit the certificate of shares claimed to be owned in the respective petitions, the date thereof, the numbers of shares are as alleged in the petition.

Mr. Crawfis: They are issued in the name of the corporation as alleged in the petition, that is I think they are, all with one exception issued in the name of G. W. Bobb Company.

Do you admit that these respective plaintiffs here, the six of them in these cases, were the owners and holders of these certificates of record on June 2nd, 1936?

Mr. Wright: Yes.

Mr. Crawfis: Do you admit that the respective plaintiffs attended that meeting on that time and voted against the proposed action?

Mr. Wright: All, either in person or by proxy.

Mr. Crawfis: Well, in this case they were all by person, I can tell you that our proof will so show.

Mr. Wright: All right, it is admitted.

Mr. Crawfis: In other words, you admit that they were the owners and holders and voted against this proposed action?

Mr. Wright: Yes.

Q. Let me ask you if a demand was served, a written notice was served by the plaintiffs in these cases upon the corporation?

A. Yes.

Q. And thereupon paper writings were marked as Plaintiff's Exhibits from 2 to 7, both inclusive.

[fol. 52] Q. I will show you here six written instruments which have been marked as Plaintiff's Exhibits 2, 3, 4, 5, 6 and 7, and ask you if those are the written objections to the proposed action, filed by the respective shareholders who are plaintiffs herein?

A. Yes.

Q. And their demands for the payment of the fair cash value?

A. Yes.

The Court: They were received and filed with the corporation?

The Witness: Yes.

The Court: As of what date were they mailed to the corporation?

The Witness: Some of them were mailed and some were handed personally, I believe.

Mr. Wright: We do not deny but what they were all received by the company within the twenty-day period.

The Court: All right, that is sufficient.

Q. Now, what did the corporation do upon receipt of those notices and demands?

Mr. Schwenker: We admitted, if you are referring to this letter, we admit the corporation refused to pay.

And thereupon a paper writing was marked for the purpose of identification as Plaintiff's Exhibit No. 8.

Q. Now, I will show you what is marked for identification as Plaintiff's Exhibit 8, and ask you to tell us what the corporation did when it received these demands.

A. The corporation mailed to each one of the plaintiffs a letter addressed to them, "your demand for payment is refused. The purpose for which the Neilston Warehouse Company was incorporated has been abandoned. Signed [fol. 53] by the Neilston Warehouse Company, G. W. Bobb, President."

The Court: They were all in the same form?

The Witness: They were all in the same form.

Mr. Crawfis: In other words, do you admit copy of letters of this identical kind, except as to the names, were addressed to the respective shareholders here and mailed —I might say we have in each the respective letter, so it may be agreed then we will let this serve?

The Court: They were all in the same form and you may admit that one and introduce it in evidence.

Mr. Crawfis: Yes, they are all multigraphed, I believe.

The Court: He says they were all in the identical language except as to the names.

Q. Did the corporation have any other reason for declining to pay than that reason stated in the respective demand or in the written letter to the respective shareholder?

Mr. Wright: Object and understand that the answer he is about to give is made over the objection.

The Court: I sustain the objection.

Mr. Wright: This is just a proffer?

The Court: That is right.

A. Well, that is a kind of a hard question.

Mr. Wright: He did not sign that letter, did he?

Mr. Crawfis: No.

The Witness: Mr. Bobb signed this letter.

Q. You were familiar with the letter at that time, were you not, Mr. Hawk?

Mr. Wright: The question is whether he knew of any [fol. 54] other reason and that can be answered by yes or no. If he doesn't know, let him say so.

A. Yes, there was other reasons.

Q. What was any other reason?

Mr. Wright: Object.

The Court: Same ruling and proffer.

A. One of the reasons was——

The Court: Rather, I will make a ruling on that question, it will be taken subject to exception.

A. One of the reasons was, we thought the shareholders should share in the right proportion, that the ones, the

objectors not receive any more than the other stockholders and that is the only one I believe.

Q. In other words, these shareholders have demanded in all instances except one $100.00, a share, and the other one demanded 56. And the only other objection that you had was as to the amount they demanded?

Mr. Wright: Object.

The Court: Overruled.

Mr. Wright: Note an exception.

A. Yes, sir.

Q. Now, I believe, Mr. Hawk, that the corporation had one kind of stock outstanding?

The Court: That has been admitted, Mr. Crawfis, this morning. All these preferred shares had been retired prior to 1930, the last of them was retired in 1930.

Mr. Crawfis: That is all preferred stock had been retired in 1930.

Q. Now, I will ask you if there is any reference anywhere in the minutes of the stockholders' meeting to pre-
[fol. 55] ferred stock after the meeting of January 20th, 1930?

A. I do not think there is any reference after that date.

Q. I will ask you if it is not a fact that there is no reference anywhere in the minutes of your stockholders' or directors' meetings to your stock other than as merely so many shares outstanding?

Mr. Wright: Object, I do not see the materiality of it, but if there was reference to other stockholders than the shares outstanding, if he wants to go into that, that might take a long time, but I do not see the purpose of it. I do not see what he is driving at.

The Court: What is the purpose of it?

Mr. Crawfis: They claim we have not designated the kind of shares. I want to show one meeting after another where they declared a dividend of one dollar per share and 50 cents per share and never referred to it as preferred or common or no par.

Mr. Wright: We went over that this morning.

The Court: It is agreed that from 1930 on there was no class of stock other than the class of stock which the plaintiffs held, it was all the same class of stock.

Mr. Wright: That is right.

Q. I will ask you if it is not a fact that on January 29th, 1931, you had an annual meeting of the stockholders. You may refresh your recollection from your minutes, and declared a dividend of one dollar per share without any reference to the kind of stock.

Mr. Wright: Object to the question. We do not see how it could possibly be relevant because of our admission.
[fol. 56] The Court: Is it not directed directly to the point that these shareholders, whoever they might have been, wherever this controversy came along, that the character of the stock was precisely the same, one share of stock in one person's hands was equivalent and had all the privileges and was of similar character as one share of stock in any other person's hands whomsoever.

Mr. Crawfis: I have no objection to the court and I have no objection to the defense understanding what we are getting at. One of their defenses is that we did not set out the kind of stock that we had.

The Court: While that may be in the pleadings, I do not know, but if it was true then, it is not true now.

Mr. Schwenker: No, we have not waived that defense.

Mr. Wright: It just boils down to this, the statute says that when they file a demand, they must state what they claim to be the fair cash value of the shares as of the day before the meeting and must state the kind of shares they have.

The Court: They must state the kind of shares?

Mr. Wright: Yes.

The Court: And they did not state?

Mr. Wright: Yes, that is right, and I presume the plaintiff wants to show that they do not have to, because there was only one class of stock outstanding, the fact is there was only one class of stock outstanding.

Mr. Crawfis: And I want to show from the evidence that they made no distinction.

Mr. Wright: We do not claim that there was any distinction. He did not say shares of no par value stock [fol. 57] except as attempting to be made now in this lawsuit to make a distinction.

Mr. Crawfis: These facts will develop, that these parties did not know what they were holding, the evidence will show here that these plaintiffs did not know what they held except they held so many shares of capital stock.

The Court: You may show what the stock was that was held by these stockholders and the form of it and that it never had been called in and rewritten or reissued. You may do that.

Mr. Crawfis: I think we can close this up, and it is what the records show, and what is your objection about it?

Q. I will ask you if it is not a fact that at a shareholders' meeting on January 29th, 1931, you declared a dividend of one dollar per share without any reference to what kind of stock it was to be paid on?

Mr. Wright: Object.

The Court: I will take it subject to exception, I can not answer until I see the record.

Q. January 29th, Mr. Wright, 1931?

A. January 29th, 1931 I do not see anything in that record there——

Q. It was my mistake, it is January 19th, 1931?

A. Yes.

Q. And again on October 26th, 1931, I will ask you if they did not declare, the Board of Directors did not declare, a dividend of one dollar per share without reference to the kind of shares?

A. Yes.

Q. And again on January 18th, 1932, if they did not de- [fol. 58] clare another dividend of one dollar per share without any reference to the kind of shares?

A. Yes.

Q. And if on January 16th, 1933, they did not have another meeting and declare a dividend of one dollar per share without any reference to the kind of shares?

Mr. Wright: Object.

Mr. Schwenker: If there had been preferred stock out it was one dollar a share and all the outstanding stock, that does not in itself indicate anything except on all stock that was outstanding irrespective of the kind or class they were going to pay one dollar a share.

Mr. Crawfis: Except they were referring to the stock as simply stock.

The Court: It seems to me that since it is admitted that while some of this stock had been issued in the name of the George Bobb Company, had been, some of it—all

of it had been called and some of them did not present their shares for reissue in the new name, it was considered and was in fact and in law a fact that every share outstanding was in the same class, same type, and everybody had equal ownership, under equal conditions after the last of that preferred stock had been retired. That is admitted. Now you have the simple question as to whether under those facts this notice which was given by these shareholders should have stipulated what kind of stock it was. I do not think so, but you can argue that with me later. The reason I say that is because everybody knew and they had to know there was just this kind of stock and they did not have to be told something they already knew, it would have been a vain thing.

[fol. 59] Q. I will ask you one other thing, Mr. Hawk, did the corporation advertise a notice to the stockholders following the meeting of May 20th, 1936, and did it notify the stockholders by advertisement in any publication of the meeting to be held on June 2nd, 1936, for the purpose of considering the proposed sale of the real estate to the Creasey Corporation?

Mr. Wright: Object, what difference does it make?

Mr. Crawfis: The difference it makes is this, you are claiming you acted under the old law. Under the old law I think you have to advertise. Now, I am asking your officer did he advertise. I want to show whether he complied with the old law.

Mr. Schwenker: These plaintiffs were at the meeting.

The Court: You may answer the question, nothing prejudicial about it.

A. No.

The Court: You sent out personal notices?

The Witness: Yes.

The Court: You did not advertise?

The Witness: No, we did not advertise.

The Court: Sent out notice by letter to the holders of stock of record just prior to that date?

The Witness: That is right.

Mr. Crawfis: In other words, they all admit receiving—I mean they were at the meeting, there is no question about that. Now, I think it is admit-ed by all of you representing

the defendants, I believe you told me you would admit this, that on January 7th, 1937, in all these cases all six of them here, we tendered back the respective certificates [fol. 60] representing the ownership of the stock. At the same time we demanded payment of the money.

Mr. Wright: That much we admit.

Mr. Crawfis: In other words, you admit the allegations of the petition in the Voeller case, that they tendered back this certificate and demanded $4,000.00.

Mr. Wright: I think if that is in your petition it is admitted because it is not denied.

Mr. Crawfis: Well, it is in the petition. And that that tender was made not only to Mr. George Bobb and Mr. Hawk as President and Secretary respectively of the Neilston Warehouse Company, but also to the liquidator, the Ohio National Bank.

Mr. Wright: That is right.

Mr. Crawfis: And that that tender was made in each instance, at the same time we demanded the money as set forth in our petition.

Mr. Wright: To anything set forth——

Mr. Crawfis: And I think you admit before also that the thirty dollars was tendered back by the plaintiff, Antoinette Kessler, on September 22nd, 1936, to both the Neilston Warehouse Company and to the liquidator.

Mr. Wright: Well, you haven't specified what $30.00 that was.

Mr. Crawfis: Well, $30.00 in cash, in other words, $30.00 was tendered back. If you are questioning what it was, we will put the witness on and show what it was. I saw the money, Mr. Bobb saw the money, Mr. Krumm saw the money, Mr. Hawk saw the money.

Mr. Wright: We do not deny for a moment that a tender [fol. 61] of $30.00 was made on that date both to the Neilston Warehouse and the liquidator.

Mr. Crawfis: That was tendering back $30.00 representing the amount of a check she had received in July, 1936, from the Neilston Warehouse Company. She converted the check into money and tendered back $30.00.

Mr. Wright: The conversion of the check into money appeared some time before the tender. I don't know about that, any evidence to that effect?

Mr. Crawfis: Are you claiming anything for that now,

or do you admit that or do you want me to go ahead and prove this case?

Mr. Wright: I am willing to admit just what I said.

Mr. Crawfis: All right.

Q. I will ask you, Mr. Hawk, if on September 22nd, 1936, if Miss Antoinette Kessler, the plaintiff in one of these cases did not come to the office of the Neilston Warehouse Company in the presence of you and Mr. Bobb and tender back $30.00 in money.

Mr. Wright: We have admitted that, we admitted she tendered back $30.00.

Q. Did you examine the money, Mr. Hawk?

A. There was none on January 7th.

Q. Well, that is the time I came there with Mr. Wright, not this Mr. Wright, another Mr. Wright. I am carrying you back to September 22nd, 1936, and ask you if you do not recall that Miss Kessler and another woman came to your office and tendered you back $30.00 in money, do you remember that?

A. I remember her coming in, I remember you coming in there with her.

[fol. 62] The Court: That is admitted anyway.

Mr. Crawfis: Well, is there some question—I don't know what distinction you are trying to draw there, maybe I am dense on this thing, is it your position she should have retained that same $30.00 which she received for the check?

Mr. Wright: Well, I don't know, the question would imply that she went down and cashed the $30.00 and then turned around and took the money back.

Mr. Crawfis: You admit she did on September 22nd tender $30.00 in money?

Mr. Wright: To the point of time, yes.

Q. Now, I will ask you then, Mr. Hawk, whether the corporation held any meeting of the stockholders for the purpose of deciding what should be done with the money received from the Creasey Corporation?

A. Will you state that question again?

(Question read.)

A. No, sir.

Q. The answer is no, sir?

A. Yes, it is no, sir.

Q. Thereupon the shareholders, as such, never authorized the Board of Directors to distribute the consideration received from the sale of its property?

A. No, sir, not specific.

Mr. Crawfis: Do you admit that these dividends or liquidating checks bearing date of July 6th, 1936, which was received by the other five plaintiffs, that is, Mrs. Voeller, Mrs. Gloeckner, Mrs. Pugh, Mrs. Williams and Mr. Bond, do you admit that those checks were all sent back?

Mr. Schwenker: Yes, we admit that.

[fol. 63] Mr. Crawfis: And that those were sent back to the corporation after they were received by the respective plaintiffs, do you admit that?

Mr. Wright: Well, some time after, I don't know how soon.

Mr. Crawfis: Well, anyhow you raise no question about that in your pleadings.

Mr. Wright: No.

Mr. Crawfis: And do you admit that those checks now were re-mailed to these respective shareholders about December 9th, 1936?

Mr. Wright: Somewhere along there.

Mr. Crawfis: Well, on December 16th, another check was sent out by the liquidator to each shareholder, that is right?

Mr. Wright: That is right.

Mr. Crawfis: And then again on January 7th, 1937, both the checks were in each instance tendered back to the corporation?

Mr. Wright: That is right.

Mr. Crawfis: And those were received by Mr. Blampied on behalf of the liquidator?

Mr. Wright: I do not understand they were received by him, I understand that he rejected them—well, you have all those checks, I thought you said he refused them.

Mr. Crawfis: All he refused to take was the $30.00, and we tendered that back to him.

Mr. Crawfis: That is all, Mr. Hawk, they may want to cross examine you.

Mr. Wright: I thought you called him for cross examination.

[fol. 64] Mr. Crawfis: Well, I did, I thought you may want to examine him.

Mr. Wright: I do not think we have any right to.

Q. I will ask Mr. Hawk a question and then I will excuse him. After the articles of incorporation of the G. W. Bobb Company were amended and the name was changed to the Neilston Hardware Company and the shares changed to $100.00 per share no par value, were the stockholders requested to turn in their old certificates?

A. No, sir.

Mr. Crawfis: That is all.

And also, ANTOINETTE KESSLER, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Crawfis:

Q. State your name.

A. Antoinette Kessler.

Q. You are the plaintiff in one of these cases?

A. Yes.

Q. I will ask you if you did receive a check for $30.00 from the Neilston Warehouse Company in July, 1936, and whether you cashed it and whether or not you later on tendered that money back?

A. I cashed it and later on I tendered it back to Mr. Bobb but Mr. Bobb said it was out of their hands and so I tendered it back to the Ohio National Bank, to Mr. Krumm.

Q. That is Mr. Alex Krumm?

A. I suppose, but anyhow he refused to accept it.

Q. Well, did Mr. Bobb refer you to——

A. Yes, he said it was out of their hands, they had nothing at all to do with it any more and it was the Ohio National Bank.

[fol. 65] Q. And what did you tender to him?

A. $30.00.

Q. In money?

A. Yes.

Q. And he refused to accept it?

A. Yes.

Mr. Crawfis: I think that is all.

Cross-examination.

By Mr. Wright:

Q. Miss Kessler. I hand you what has been marked Defendant's Exhibit A, and ask you if that is the check which you received in the amount of $30.00, dated July 6th, 1936, signed by the Neilston Warehouse Company?

A. Yes, that is my signature.

Q. And did you cash this check or did you deposit it in your account?

A. I cashed it, I think, if I remember, I couldn't just—oh, I cashed it, if I had put it in my account it would have been endorsed by them, wouldn't it?

Q. Endorsed by the bank—it is endorsed by the Franklin Federal Savings & Loan Association, have you a savings account there?

A. Yes.

Q. Did you put it in your savings account?

A. I don't know whether I put it in or cashed it, I couldn't say that. Sometimes I put them in and sometimes I cashed them, those little checks, I don't remember.

Mr. Wright: That is all.

Redirect examination.

By Mr. Crawfis:

Q. Did you know when you cashed that check that the Neilston Warehouse Company had no authority to distribute that money?

Mr. Wright: Object, that assumes a question that calls for a conclusion.

[fol. 66] The Court: I will take it subject to exception.

A. No, I didn't know it.

Q. I will ask you how soon you tendered that money back after you found out or were advised—I will ask you if you were advised that the corporation at any later time had no authority to distribute that money?

Mr. Wright: Object, we are going far afield here, it seems to me.

The Court: I will take it subject to exception.

A. Did I know——

(Question read.)

A. I tendered it back September 22nd.

Q. I said how soon now were you advised, were you advised after you had cashed that check that the corporation had no right to distribute that money?

A. Yes, I was advised.

Q. And how soon after you were advised did you tender the money back to the corporation?

A. It was about the same time or very shortly after.

Q. Well, refreshing your recollection, I will ask you if you recall whether it was the same day?

A. I went to both places the same day, yes, it was the same day, the same day.

Q. That you were advised?

A. Yes.

Mr. Crawfis: That is all.

Recross-examination.

By Mr. Wright:

Q. Miss Kessler, do I understand then that the reason you tendered back $30.00 on the day you said you did was because someone advised you the corporation had no au-
[fol. 67] thority to make a distribution?

A. Yes, and I had no reason for selling, and I believed my stock was worth $100.00 up until the time the Creasey took it over.

Mr. Wright: I move to strike out the latter part.

The Court: Overruled.

Q. You have testified in answer to a question that Mr. Crawfis has asked you that on September 22nd you were advised that the corporation had no authority to make a distribution which was represented by the thirty dollar check which you had received and it was for that reason that you——

A. Well, that is the reason I——

Q. Wait until I finish that, and that after receiving that information you got $30.00 and tendered it back?

A. Yes, but that was my intention all along, that we didn't receive full value, I was not in favor of accepting that and I had cashed the check when I got it, I didn't need the money and I didn't think that made any difference.

Q. And when you tendered it back someone had advised you that the corporation was without authority to make the distribution?

A. Well, mostly.

Mr. Wright: That is all.

Mr. Crawfis: That is all.

[fol. 68] And also, GEORGE W. BOBB, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Crawfis:

Q. You were the President of the G. W. Bobb Company and the Neilston Warehouse Company, I believe, from the time it was incorporated until it was dissolved?

A. Yes.

Q. I will show you what has been marked Plaintiff's Exhibit No. 8, and ask you if that is your signature on there?

A. It is.

Q. That is the letter dated June 26th, 1936?

A. Yes.

Q. And if you signed that as President of the Corporation?

A. Yes.

Q. And you signed a similar one and sent to each of the plaintiffs in these six cases here?

A. This one being addressed I can answer this, and if you have the six, I suppose, it is all right.

Mr. Crawfis: Well, they are all here.

Q. Well, in other words, it was a letter, that was a multigraph, that is right, is it not, you simply filled in the names and addresses of the respective shareholders?

A. Yes.

Mr. Crawfis: So you did send a similar refusal to each of the shareholders. That is all.

Cross-examination.

By Mr. Wright:

Q. Do you know when the G. W. Bobb Company was incorporated?

A. August, 1903.

[fol. 69] Q. What business did it engage in?

A. Wholesale grocery business?

Q. And how long did it engage in that business?

A. In the grocery business until I think August or September, 1925.

Q. What occurred then?

A. In 1925, when we sold out the grocery, the stock on hand, the merchandise, at the same time the directors wanted to close their affairs and sell the building.

Mr. Crawfis: Object to this.

The Witness: He has asked me what happened.

Q. The point I was getting at was, in September of 1925, or October of that year, the G. W. Bobb Company sold all of its merchandise which it was using in connection with the wholesale grocery business to the Midland Grocery Company, did it not?

A. Yes.

Q. And at the same time was that sale authorized by the directors and the stockholders of the G. W. Bobb Company?

Mr. Crawfis: Object, not material.

The Court: I will take it subject to exception.

A. Yes.

Mr. Crawfis: We rest.

And thereupon the plaintiff rested.

[fol. 70] And be it further remembered that the defendants, to maintain the issues on their part to be maintained, offered and introduced in testimony on their behalf, the following evidence, to wit:

George W. Bobb, called as a witness on behalf of defendants, having been heretofore duly sworn, testified as follows:

Examined by Mr. Wright:

Q. Mr. Bobb, I ha-d you what may be marked for identification as Defendant's Exhibit B.

And thereupon a paper writing was marked for identification as Defendant's Exhibit B.

Q. (Continuing.) And I will ask you to look at the printed notice there, and ask you if that is a copy of the printed notice which was published at the time following the meeting of the shareholders in 1925?

A. Yes.

Mr. Wright: I should like to introduce that in evidence and read it in the record.

Mr. Crawfis: I object as being immaterial.

The Court: Well, I don't know whether it is or not, I take it subject to exception, there is no jury present.

Mr. Wright: Notice to shareholders. To the stockholders of the G. W. Bobb Company: You will please take notice that a special meeting of the stockholders of the G. W. Bobb Company will be held at the office of the company, Neilston and Naghten Streets, Columbus, Ohio, on Saturday, the nineteenth of September, 1925, at two o'clock p. m., for the purpose of considering and acting upon a proposed agreement for the sale of the entire stock of merchandise of the company and also for considering and [fol. 71] acting upon the disposition of all of its other assets. The G. W. Bobb Company, by R. F. Coons, Secretary. Dated Columbus, Ohio, September 9, 1935.

The Court: I did not quite get the purpose of that.

Mr. Wright: They did not dissolve and did not go out of business at that time. We want now to show what happened after this occurred.

The Court: What is the purpose of it?

Mr. Wright: It has to do with this question of estoppel raised by Mr. Crawfis in his reply.

Mr. Crawfis: I might say in return we do not go back to that time. We do not claim anything that took place back there by way of estoppel and we do not begin claiming anything until after—well, beginning in June, 1927, put it that way, so we move that the testimony go out, the last answer.

The Court: Well, for the moment I do not see the competency of it, but Mr. Wright thinks it is and he may put it in the record subject to exception. I am in no position to judge yet.

Q. There was a meeting of the stockholders held pursuant to that notice, was there not, Mr. Bobb?

A. Yes.

Q. And state whether or not at that meeting the sale of these assets, that is the entire stock of merchandise, was authorized by the stockholders?

A. Yes.

Q. And was the sale consummated?

A. Yes.

The Court: That is to the Midland Grocery Company?

The Witness: To the Midland Grocery Company.

Q. And what, if anything, did the corporation do after that sale was consummated with respect to the sale of the [fol. 72] other assets of the corporation?

A. Well, we had the building for sale with several real estate people, trying to dispose of it, and unable to get any offer that the Board of Directors would accept.

Q. What efforts were made to sell the property?

Mr. Crawfis: Object.

The Court: It is all taken under exception.

Mr. Crawfis: Of course, we waived a lot of testimony here in order to save this record after Mr. Wright's insistence not to encumber the record, and I cannot possibly see any materiality in this or anything they have raised in the pleadings. They are making no defense because of it, they have in some seven defenses, I believe it is, but that does not come under the category of any defenses they raised.

The Court: I am inclined to agree with you. I do not see any purpose of it, but since this is before the court and not a jury, I am permitting him to make up a record which he claims is competent; now, maybe, he can show later it is competent. I do not see it right now, but if it is not, there is no harm done. Let it be understood that all these questions are taken subject to exception.

(Question read.)

A. I believe I answered that before, that we had given it to several real estate people to sell for us.

Q. Were you operating any business at that time?

A. No, sir.

Q. Did you have a piece of real estate located at Neilston and Buckingham Streets?

A. Yes.

Q. And do you recall whether or not that was sold, and [fol. 73] if so, when?

A. I just don't know the date it was sold, shortly around about that time.

Q. To refresh your recollection, was it about April, 1926?

A. I think that is right, I believe that is right.

The Court: Now, may I inject a question here. You did sell the grocery stock?

The Witness: The grocery and merchandise only.

The Court: And you did sell this piece of real estate at that time?

The Witness: Yes.

The Court: And what was done with the proceeds, did you distribute that prorata?

The Witness: No, just kept in our account and money was utilized to call in preferred stock, we kept calling that in all the time until we cleaned that up.

Q. Now, on June 26, 1926, at a directors' meeting there was a resolution adopted to pay the preferred stockholders in liquidation a dividend of 40 per cent, to pay it as of July 1, 1926. Do you recall whether or not that was done?

A. Yes, that was done.

Q. Were the officers of the company at all these times endeavoring to sell the property?

Mr. Crawfis: Object to the leading question.

The Court: Well, there is no jury here.

A. Yes.

Q. Did the company receive offers and make propositions in regard to the sale of this warehouse property, we refer to it as the warehouse property, the Bobb Building, from time to time during these years?

Mr. Crawfis: Object to the leading question, and I am [fol. 74] serious on that objection; I do not want the witness to answer until the court rules on it.

The Court: Objection sustained.

Q. State whether any negotiations were had, if you know of any, in regard to the sale of this real estate following the sale of the merchandise of 1925?

A. No detail when negotiations were completed.

Q. Were there negotiations?

A. There were some negotiations.

Q. Do you recall in February, 1927, a proposition made by the Lazarus Company?

A. Yes.

Q. What was that, if you recall?

A. There was offered us a cash consideration, I think, that it was 125 or $150,000, and a 99-year leasehold on some property which was over on Third Street which the Directors did not approve.

Q. Do you recall when the last of the preferred stock was called in and retired by liquidation?

Mr. Crawfis: It was agreed it was in January, 1930.

The Court: That is right.

Q. Was that about the date, Mr. Bobb?

A. Yes.

Q. Now, coming down to the beginning of 1936, do you recall an offer being made to purchase the property by the Irvin Realty Company?

A. Yes.

Q. Do you recall what they offered for the property?

A. Around $171,000 in round figures.

Q. And assume the mortgage?

A. And assume the mortgage.

Q. And what happened as a result of that offer?

A. They raised their offer to——

Q. I mean what action was taken with respect to that [fol. 75] offer?

A. Oh, that was put up to the stockholders and was not accepted.

Q. To refresh your recollection, was not the offer at that time, in April, 1936, the payment of $101,560 and assume the mortgage?

A. It might have been, yes.

Q. And that contemplated the payment of $25,000 in cash and $76,560 mortgage?

A. Yes.

Q. There was a first mortgage on the property at that time held by the Prudential?

A. Yes.

Q. On which there was a balance of approximately $70,000?

A. Approximately, yes.

Q. And that proposition was rejected by the shareholders, was it not?

A. Yes.

Q. And then in May of that same year, The Creasy Corporation made an offer of $126,950 and to assume the mortgage indebtedness?

A. Yes.

Q. (Continuing). To be paid, $25,000 in cash and the balance by notes over a period of time, secured by a second mortgage, is that right?

A. That is right.

Q. And the sale was made after the authorization by the directors and stockholders, was it not?

A. That is right.

Q. Mr. Bobb, did you see the written demands that were sent to the company by certain dissenting shareholders?

A. I do not remember but I might have seen them, I paid no attention.

Q. Do you know who those shareholders were?

A. I know of the ones that are here, Mrs. Voeller, Mrs. Pugh, Miss Kessler, Mr. Bond and Mrs. Williams, yes, I know these six.

[fol. 76] Q. I hand you what may be marked Defendant's Exhibit C.

And thereupon a paper writing was marked for purposes of identification as Defendant's Exhibit C.

Q. (Continuing). And ask you if you will look at that list and refresh your recollection as to the names of the person and the number of shares and the amounts demanded.

Mr. Crawfis: I would like to know who made up this list and so forth before he refreshes his recollection.

Mr. Wright: I made it up from the original demands which I have right here.

A. I recognize the names, but I cannot positively say as to the amount of shares they all had.

The Court: Well, Mr. Wright made that up from that list which you have here?

The Witness: So it must be correct, yes.

The Court: You can check it, Mr. Crawfis.

Mr. Crawfis: Yes, I have no idea what the purpose is.

Mr. Wright: These are all the original demands and they were made up in my office.

We wish to offer in evidence this Exhibit C.

Mr. Crawfis: Object.

The Court: I doubt its competency, whether it has been properly authenticated yet. Do you object on that ground or on the ground that it is not relevant?

Mr. Crawfis: I object on the ground that it is not relevant.

The Court: I will admit that under objection.

And thereupon the paper writing above referred to was [fol. 77] offered and admitted in evidence on behalf of the defendants, subject to exception on behalf of plaintiff, which exhibit is hereto attached and made a part hereof.

Mr. Wright: I offer Defendants' Exhibit A.

Mr. Crawfis: No objection.

The Court: That may be admitted.

And thereupon the paper writing above referred to was offered and admitted in evidence on behalf of the defendants, which exhibit is hereto attached and made a part hereof.

Mr. Wright: That notice that I read in the record was offered and received subject to exception?

The Court: What?

Mr. Wright: You recall I read the notice of the stockholders' meeting back in 1925?

The Court: Yes, that was offered and taken subject to exception. I think you read it into the record, did you not?

Mr. Wright: Yes, I read it into the record. May we stipulate that all but a few of the shareholders of the Neilston Warehouse Company became shareholders in that com-

pany or its predecessor, the G. W. Bobb Company, prior to 1929, prior to July, 1929?

Mr. Crawfis: No, I couldn't agree to that stipulation.

The Court: Haven't you made up a list of those, haven't you got a list that you made up yourself?

Mr. Wright: Mr. Arnold made it up and we can put him on to testify that of these shares here they were all shareholders as of that date.

The Court: That is taken from the transfer books?

[fol. 78] Mr. Arnold: Taken from the stock book certificates.

Mr. Crawfis: Let me ask you why you would make up a list from July 29th, 1929, in other words, what is the significance of the date you are speaking of.

Mr. Wright: The date given there is the date on which this Section 8623-72 of the Code was amended to include this conclusive presumption.

Mr. Crawfis: The General Corporation Act became effective in June, 1927.

Mr. Wright: Yes, but it had no reference to any conclusive presumption in it, that didn't apply until July, 1929.

Mr. Crawfis: Anyway that is your reason for starting from that date?

Mr. Wright: That is right.

Mr. Crawfis: Unless you put in the complete record showing what was done down there, I would rather you would produce the record showing what transfers were made from June, 1927, on.

Mr. Wright: Well, if it will not be admitted, why we will prove it. Mr. Arnold, take the stand.

And also H. B. Arnold, Jr., called as a witness on behalf of defendants, being duly sworn, testified as follows:

Examined by Mr. Wright.

Mr. Crawfis: Now, let us see, I am objecting, of course, to the materiality of this.

The Court: Well, of course, that is one basis of their claim. In his opening statement he was contending that [fol. 79] these folks were stockholders prior to the date when this law became effective, and therefore, they had

contractural relations with each other which could not be impaired by a later statute, that is his part.

Q. State your name.
A. H. B. Arnold, Jr.
Q. And you are a lawyer by profession.
A. That is right.
Q. Did you examine the corporate records of the Neilston Warehouse Company which relate to the issuance of shares of stock of that company?
A. I did.

Mr. Crawfis: Understand, I am saving my exceptions to the materiality of it, but if the Court will permit this to go in subject to exception.
The Court: All right.

Q. I hand you what has been marked Defendants' Exhibit D, two pages, and ask you to state whether or not the exhibit shows a list of all of the shares of the stock of the Neilston Warehouse Company issued since July 19th, 1929?
A. It does.

The Court: Those issued since 1929?
Mr. Wright: That is right.
The Court: Does that include these plaintiffs, I take it they do not?
Mr. Crawfis: They were all issued prior to that except Mrs. Williams' exchange which stood in the name of her husband. All the other outstanding shares of the company were issued prior to that date?
The Witness: Yes.
Mr. Wright: I offer this Exhibit D in evidence.
The Court: Admitted. You make no objection because that is not the best evidence?
[fol. 80] Mr. Crawfis: No.
And thereupon the paper writing above referred to was offered and admitted in evidence, marked Defendants' Exhibit D, and attached hereto.

And thereupon the defendant rested.

And the foregoing is all of the testimony and evidence offered, introduced and admitted in evidence on behalf of plaintiff and on behalf of defendants on this trial of this cause.

April 2, 1938.

This cause came on for further hearing on April 2, 1938, at the request of counsel for the plaintiffs, and was heard on said date before His Honor Judge Charles A. Leach.

STIPULATION AS TO CERTAIN FACTS

The plaintiff desiring to reopen the case for the purpose of offering additional evidence upon the issues involved, has requested this hearing. In lieu of taking testimony or submission of evidence the parties, by their counsel, have agreed to stipulate the following facts, subject to objections and exceptions for relevancy and materiality, and the same, subject to objections and exceptions, is hereby made a part of the record.

1. It is agreed that all the shareholders appearing upon the list of shareholders which was introduced in evidence by the defendants and marked Exhibit C, except the six plaintiffs in the six separate cases under consideration, received, accepted and cashed the liquidating checks sent out by the defendant corporation, the Neilston Warehouse Company, on July 6, 1936, and also that all such shareholders appearing upon said list marked Exhibit C, except the six [fol. 81] plaintiffs in the six separate cases under consideration, received, accepted and cashed all liquidating checks sent out by the Ohio National Bank as liquidator of the defendant, The Neilston Warehouse Company, on December 16, 1936, but nothing in this stipulation shall affect or have any bearing upon the evidence heretofore introduced in this case respecting the plaintiff Antoinette Kessler and the facts with respect to her acceptance and cashing of the liquidating dividend check dated July 6, 1936, and her subsequent tender of money to the defendant, the Neilston Warehouse Company. The defendants object and except to the foregoing facts as being immaterial and irrelevant.

2. That at the meeting of the shareholders of the G. W. Bobb Company held on Saturday, September 19th, 1925, no action was taken by the stockholders of said company authorizing the sale of the company's real estate.

3. That the shareholders of the Neilston Warehouse Company did not on June 2, 1936, or at any time thereafter take any action authorizing or affecting the distribution

of the proceeds of the sale of the company's property to The Creasy Corporation of Louisville, Kentucky.

4. At a meeting of the shareholders of the G. W. Bobb Company, held June 30, 1927, at which resolutions were adopted amending the articles of incorporation of said company, the shareholders approved and adopted a resolution changing the name of the corporation from the G. W. Bobb Company to the Neilston Warehouse Company, and [fol. 82] also enlarged the purpose clause as contained in the articles of incorporation so as to permit the corporation to engage in the warehouse business.

The above and foregoing testimony, together with the exhibits offered and hereto attached and made part hereof, is all the evidence given and offered by the parties upon the trial of this cause.

Thereupon counsel for the parties argued the case to the court.

Thereupon after argument of counsel the court rendered a decision in favor of the defendants and against the respective plaintiffs in the six separate cases which have been hereinbefore identified, all as appears of record.

Thereupon within three days after said decision was rendered, to wit, on the first day of August, 1938, the respective plaintiffs in each of the six separate cases hereinbefore identified filed separate motions for new trials on the grounds therein set forth.

Thereupon and thereafter, to wit, on November 10th, 1938, the six separate cases hereinbefore identified and which were tried together, were, upon application, consolidated and it was ordered that all further proceedings in said consolidated action be had in and under said case No. 151,-264, now pending in this court.

Thereupon and thereafter, to wit, on November 10th, 1938, the court overruled said motion for a new trial in said consolidated action and thereupon dismissed said consolidated action and thereupon rendered judgment in favor of the defendants and against the plaintiffs, to all of which plaintiffs excepted.

[fol. 83] And thereupon on the sixth day of December, 1938, being within 40 days after the overruling of the motion for new trial in this consolidated action, as allowed by law, the plaintiffs filed with the undersigned Clerk of this Court, this, their bill of exceptions herein, and an entry of the filing

thereof was made on the appearance docket in this cause by me.

J. Arthur Yoder, Clerk. By: W. W. Price, Deputy Clerk.

And thereafter, to wit, on the sixth day of December, 1938, the adverse parties having waived notice of the filing and having consented to the immediate transmission of said bill of exceptions to the trial judge, the bill of exceptions, together with all objections and amendments filed thereto, were transmitted to the trial judge.

J. Arthur Yoder, Clerk. By: W. W. Price, Deputy Clerk.

ORDER SETTLING BILL OF EXCEPTIONS

Received this bill of exceptions with all objections and amendments thereto, from the clerk of said court, this sixth day of December, 1938, and thereafter, to wit, on the sixth day of December, 1938, being within five days after the receipt thereof, and within the time allowed by law, said bill of exceptions is corrected, allowed and signed, and forthwith this day transmitted to the clerk of this court to be filed in this case and an entry thereof made on the appearance docket herein and made a part of the record, but not spread upon the journal.

Witness my signature the day and date last above mentioned.

Charles A. Leach, Trial Judge.

[fol. 84] The undersigned, attorneys for the adverse parties herein, hereby waive notice of the filing and consent to the immediate transmission of this bill of exceptions to the trial judge.

December 6, 1938.

Arnold, Wright, Purpus & Harlor, Krumm & Schwenker, Attorneys for Defendants.

PLAINTIFF'S EXHIBIT No. 2

The Neilston Warehouse Company, 260 East Naghten street, Columbus, Ohio.

Notice and Demand

I, Olga E. Voeller, being the owner and holder of 40 shares of capital stock in The Neilston Warehouse Company, not

having voted in favor of the resolution to sell all real estate of this corporation to The Creasey Corporation in the meeting of the shareholders on June 2, 1936, do hereby object to the action taken upon said resolution at said meeting and hereby demand the payment to me of the fair cash value of my said shares of stock, which value I claim to be $100.00 per share, making a total of $4,000 for the total of 40 shares I hold.

Olgar E. Voeller.

June 22, 1936.

(Notices and demands of other five plaintiffs, Plaintiff's Exhibits 3-7, inclusive, are identical except as to date, number of shares and amount demanded.)

[fol. 85] PLAINTIFF'S EXHIBIT 8

The Neilston Warehouse Co., 260 E. Naghten—Corner Neilston Street

Columbus, Ohio, June 26, 1936.

Mrs. Olga E. Voeller,
943 Livingston Avenue,
Columbus, O.

Your demand for payment is refused.

The purpose for which The Neilston Warehouse Company was incorporated has been abandoned.

The Neilston Warehouse Company, By G. W. Bobb, President.

DEFENDANTS' EXHIBIT "A"

(Check)

No. 1767.

Columbus, Ohio, July 6, 1936.

Pay to the order of Antoinette Kessler, $30.00, the sum of $30 and 00 cts.

The Neilston Warehouse Co., Wm. H. Hawk, Treasurer.

The Ohio National Bank,
Columbus, Ohio.

Across the face: Dividend in liquidation of $5.00 per share.

Endorsed on back: Antoinette Kessler.

Stamped on back: Pay to the order of The Ohio National Bank, Columbus, Ohio. Franklin-Federal Savings & Loan Ass'n. Fred C. Kaiser, Sec'y.

[fol. 86] DEFENDANTS' EXHIBIT "C"

Dissenting Shareholders Who Made Written Demands.

Names	Number of Shares	Amounts Demanded
C. R. McKinley	2	$ 200.00
Clarence Swope	9	900.00
Frank A. Kirchner	8	800.00
Clara Swope	14	1,400.00
John M. Scott	4	400.00
Elizabeth Ann Swope	4	400.00
Clara McAfee	8	800.00
Ada K. Elliott	3	300.00
Arthur G. Sautter	8	800.00
George M. Hoeffner	11	1,100.00
Ruth Myers	16	1,600.00
Jennie & Jessie Bean	32	3,200.00
Jean R. Pritchard	21	2,100.00
Olga E. Voeller	40	4,000.00
Butler C. Bond	7	700.00
William P. Stephens	1	100.00
Harry S. Wells	8	800.00
Marie A. Mohr	5	300.00
Nellie E. Pugh	128	12,800.00
Anne D. Turner	64	4,480.00
Charles C. Morris	5	250.00
Belle Black Estate	17	850.00
Lizzie Black	22	1,100.00
Howard C. Black	8	400.00
James W. Black	16	800.00
Bertha C. Moore	12	600.00

[fol. 87] Names	Number of Shares	Amounts Demanded
Maye B. Williams	80	4,480.00
Dorothea Gloeckner	27	2,700.00
C. L. Coutellier	43	4,300.00
Paul Drees	48	4,800.00
Herbert A. Higgins	5	500.00
Hedwig E. Gamper	4	400.00
Antoinette Kessler	6	600.00
Gertride Gamper	4	400.00
Daisy and Nettie Schaefer	20	2,000.00
Charles A. Olds	31	3,100.00
Katherine Goodman	20	2,000.00
R. W. Williams	13	1,300.00
Sarah A. Cox	3	300.00
Frank L. Lumbert	3	300.00
Bertha G. Brown	3	300.00
Sarah M. Parish	5	500.00
Elizabeth Lonbrake	3	300.00
F. A. Arn	14	1,400.00
Flora Streibel	13	1,300.00
Total	818	$72,160.00

[fol. 88] In Court of Appeals of Franklin County, Ohio

No. 3001

Olga E. Voeller, et al., Plaintiffs-Appellants,

vs.

The Neilston Warehouse Company, et al., Defendants-Appellees.

Application for Rehearing—Filed May 19, 1939

Now come the defendants-appellees and respectfully make application to the Court for a rehearing herein, for the reasons and on the grounds set forth in the brief submitted herewith.

Arnold, Wright, Purpus & Harlor, Krumm & Schwenker, Attorneys for Defendants-Appellees.

IN COURT OF APPEALS OF FRANKLIN COUNTY

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1938, November 30. Transcript of Docket and Journal Entries filed.

1938, December 6. Bill of exceptions filed.

1938, December 28. (3) Brief of plaintiff-appellants filed.

1938, December 28. Proof of service filed.

[fol. 89] 1939, February 2. (3) Brief on behalf of defendants-appellee filed.

1939, February 2. Proof of service filed.

1939, February 25. (3) Reply brief of plaintiff appellants filed.

1939, February 25. Proof of service filed.

1939, March 4. (3) Appellee brief in reply and brief of appellants filed.

1939, March 4. Proof of service filed.

1939, March 13. (3) Supplemental to original brief of appellants filed.

1939, March 13. Proof of service filed.

1939, March 22. (3) Answer to supplement filed.

1939, March 22. Proof of service filed.

1939, March 27. (3) Reply to supplements appellants' brief filed.

1939, May 9. Decision rendered and filed.

1939, May 19. (3) Application for rehearing filed.

1939, May 19. Proof of service filed.

1939, May 23. (3) Answer to plaintiff-appellants filed.

1939, May 23. Proof of service filed.

1939, May 25. (3) Reply brief of defendant-appellees filed.

1939, May 25. Proof of service filed.

1939, May 26. Proof of service filed.

1939, June 2. Decision rendered and filed.

1939, June 21. Final entry reversing judgment of lower court.

1939, June 21. Ordering consolidate cause be remanded filed.

[fol. 90-92] 1939, June 21. Mandate issued and filed. 6-129.

1939, July 8. Notice of appeal to Supreme Court filed.

1939, July 8. Precipe for transcript of Docket and Journal Entry filed.

This consolidated cause came on to be heard on the appeal upon questions of law from the judgment of the Court of Common Pleas of Franklin county, Ohio, and was argued by counsel, and on consideration the court finds there is error in the said record and proceedings of said court prejudicial to the rights of plaintiff-appellants in that said Common Pleas Court erred in finding that General Code Section 8623-72, as to the seventh unnumbered paragraph thereof, was unconstitutional as being in violation of the due process clause of the Constitution of the United States.

Thereupon, after announcement of the court's decision on said appeal, the defendants-appellees filed herein an application for a rehearing of said appeal, and on consideration thereof the court finds that said application should be and the same is hereby denied.

It is therefore ordered and adjudged that said judgment and proceedings be and the same are hereby reversed, and that said appellant recover of appellees their costs herein taxed at .....

And it is further ordered that this consolidated cause be remanded to said court for further proceedings according to law.

To all of which findings, orders and judgment the defendants-appellees except.

Frank W. Geiger, Roscoe G. Hornbeck, J. D. Barnes, Judges.

[Duly certified.]

[fol. 93] IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY

[Title omitted]

No. 151264

ORDER GRANTING LEAVE TO FILE AN INTERVENING PETITION—Filed April 10, 1937

Leave is hereby granted Bertha K. Krauss to file an intervening petition herein.

Reynolds, Judge.

IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY

INTERVENING PETITION—Filed April 10, 1937

1. Now comes Bertha K. Kraus on behalf of herself as a shareholder in The Neilston Warehouse Company, and on behalf of all other shareholders in said company who are similarly situated and who have not made any claims or demands in respect to the sale by said company of its real estate located at the corner of Neilston and Naghten streets in the city of Columbus, Ohio, and files this intervening petition, having first obtained leave of court so to do.

[fol. 94] 2. Said intervening petitioner avers that The Neilston Warehouse Company was a corporation organized under the laws of the state of Ohio on August 3, 1903, under the name of The G. W. Bobb Company, and had its principal place of business in the city of Columbus, Ohio; that on July 6, 1927, the name of the corporation was changed to The Neilston Warehouse Company; that she became a shareholder in said company on the tenth day of September, 1919, and has continued as such since said date; that said company owned certain real estate situated at the corner of Naghten and Neilston streets in the city of Columbus, Ohio; that its property was a special use property, to wit, a large building constructed principally for warehousing purposes, and that the market for such real estate was limited and restricted; that for a number of years it has been endeavoring to dispose of said property as well as other assets so that it might dissolve and liquidate; that in May of 1936 it received an offer from The Creasey Corporation of Louisville, Kentucky, to purchase said property for the sum of $196,950, as follows: $25,000 in cash, purchaser to assume balance due on first mortgage in the amount of approximately $69,000; the balance of the purchase price of $102,950 to be evidenced by the purchaser's note for that amount secured by a second mortgage on the said property, which note is payable over a period of years; that on May 20, 1936, the directors of said The Neilston Warehouse Company met, considered said offer and called a special meeting of the shareholders of The Neilston Warehouse Company to consider and act upon the proposal; that said meet-
[fol. 95] ing of shareholders of said company was held on June 2, 1936, pursuant to notice to all shareholders; that

said notice did not state that the purpose of the meeting was to consider and act upon a proposal to sell all or substantially all of the property of the company; that at that time there were 5,078 common shares of The Neilston Warehouse Company issued and outstanding, of which 4,783 shares were represented at said meeting in person or by proxy; that at said meeting a resolution was offered, the object of which was to authorize the board of directors of the company to accept the offer of the said The Creasey Corporation of Louisville, Kentucky, and a vote was taken thereon, with the result that 3,591 shares or more than two-thirds of all the outstanding shares voted in favor of the proposal and 1,125 shares voted against such proposal. Thereafter said sale was consummated in accordance with said proposal and liquidation of the corporation was begun; on August 31, 1936, formal dissolution proceedings were had in accordance with the statutes of Ohio, in connection with which all of the remaining property and the assets of the company were transferred and delivered to The Ohio National Bank of Columbus, as liquidating agent. The liquidation of the company has proceeded, and is still continuing,—each shareholder being paid his pro rata share of the assets of the corporation.

3. Said intervening petitioner says that the action taken by said shareholders at said meeting held on June 2, 1936, did not authorize the sale of all or substantially all of the assets of the company as contemplated by the provisions [fol. 96] of Section 8623-65 and Section 8623-72 of the General Code of Ohio.

4. Said intervening petitioner further avers that certain shareholders of the company, including plaintiff, who had not voted in favor of the proposal to sell the company's property located at the corner of Naghten and Neilston streets, believing Section 8623-72 of the General Code of Ohio to be applicable, attempted to file written demands as provided in said Section 8623-72 within twenty days after the date of said shareholders' meeting, but said intervening petitioner avers that said written demands were not made or filed in compliance with said statute, in that they did not state the kind of shares held by the plaintiff or the amount which the plaintiff claimed to be the fair cash value of her

shares as of the day before the vote was taken authorizing such action.

5. Said intervening petitioner further avers that if the plaintiff has any rights as a dissenting shareholder under said Section 8623-72, which the intervening petitioner denies, her remedy is exclusively provided for in said Section 8623-72, which requires that an action be brought within six months following the date of the shareholders' meeting at which such action was authorized. The plaintiff did not bring her action within said six months period and such action is now barred.

6. Said intervening petitioner avers that said Section 8623-72, in so far as it attempts to create or establish a conclusive presumption that the fair cash value of the shares of a dissenting shareholder shall be deemed to be equal to the amount demanded by such dissenting share-
[fol. 97] holder who has complied with the provision of said Section 8623-72, is unconstitutional and void as being in violation of, and contrary to, Section 1 of the Fourteenth Amendment to the Constitution of the United States in that its effect is to deprive the intervening petitioner and other shareholders similarly situated, of their property without due process of law and said statute is also in contravention of Sections 1, 2, 5 and 19 of Article I of the Constitution of the state of Ohio, in that its effect is to deprive her and said shareholders of the protection and rights therein guaranteed.

7. Said intervening petitioner further avers that the rights of all shareholders of The Neilston Warehouse Company as respects the property and assets of the corporation were contractual and determined by the shares of stock and laws in effect when said corporation was organized and when such shares were purchased; that such rights became and were vested property rights; that among such rights was the right to participate pro rata with all other shareholders in the distribution of corporate assets upon liquidation of the company excepting that in certain circumstances specified in statutes then in force the fair cash value of the shares of dissenting shareholders was to be determined upon a consideration of all the facts bearing upon the fair cash value of such shares; that said vested rights of said

intervening petitioner and other shareholders similarly situated were not affected by said provisions of Section 8623-72 which was enacted July 24, 1929; that in so far as said provisions of Section 8623-72 purport to change and alter such [fol. 98] vested rights of said intervening petitioner and said shareholders similarly situated, to their prejudice and damage, it is unconstitutional and void in that it impairs the obligation of the contracts of said shareholders with said corporation in violation and contravention of Article I, Section 10, of the Constitution of the United States and Article II, Section 28 of the state of Ohio.

8. Said intervening petitioner further avers that the fair cash value of the shares of The Neilston Warehouse Company on June 1, 1936, was approximately $25.00 per share; that shareholders owning 810 common shares of The Neilston Warehouse Company filed written demands on said company for payment to them of certain varying amounts in the total sum of $71,760, which it is claimed or will be claimed must be paid to them in preference to and before any amounts can be distributed or paid to the holders of the remaining 4,268 shares; that the amounts which the owners of said 810 shares claim to be entitled to in distribution range from $56.00 per share to $100.00 per share; that if such amounts are allowed and paid to such shareholders, there will be available for payment to the remaining 4,268 shares not to exceed $13.00 a share; that if the plaintiff and the other owners of said 810 shares are permitted to recover in this action and other similar actions on the theory advanced by the plaintiff herein, the said owners of 810 shares of said company will receive from the total assets of the company $71,760, whereas the owners of 4,268 shares will receive only about $56,000, or, in other words, the owners of sixteen per cent (16%) of the [fol. 99] total issued and outstanding shares of the company will receive fifty-three per cent (53%) of the total assets of the company, whereas the owners of eighty-four per cent (84%) of the said issued and outstanding shares will receive only about forty-seven per cent (47%) of the total assets of the company.

9. Wherefore, this intervening petitioner prays that her rights and the rights of all other shareholders in The Neilston Warehouse Company, similarly situated, be protected

and that such order or decree may be entered herein as will be fair and just to all of the shareholders of said company, and for such other relief as may be proper in law or in equity.

Krumm & Schwenker, Arnold, Wright Purpus & Harlor, Attorneys for Bertha K. Kraus.

[Duly verified.]

In Court of Common Pleas of Franklin County

Motion to Strike—Filed April 30, 1937

Now comes the plaintiff and moves the court for an order striking from the files the intervening petition herein by Bertha E. Krauss and dismissing said Bertha E. Krauss as a party herein for the reason that said intervening petition sets up no defense not available to the defendant, The Neilston Warehouse Company, and said Bertha E. Krauss is not a proper party to the pending action.

O. R. Crawfis, Attorney for Plaintiff.

[fol. 100] In Court of Common Pleas of Franklin County

Motion for Rehearing—Filed February 17, 1938

Now comes the defendant, Bertha K. Krauss and moves the court for a rehearing upon the motion of the plaintiff to strike from the files the intervening petition filed by Bertha K. Krauss and to dismiss said Bertha K. Krauss as a party defendant herein, which said motion of the plaintiff was filed on the —— day of ——.

Arnold, Wright, Purpus & Harlor, Krumm & Schwenker, Attorneys for Intervening Petitioner Bertha K. Krauss.

In Court of Common Pleas of Franklin County

Opinion

On rehearing the motion of plaintiff to strike from the files the intervening petition of Bertha K. Krause is sustained.

Leave to file the intervening petition was granted in an ex parte hearing without notice to plaintiff, and unless relevant, and material to the issues in the case, it has no place in the case.

The action here is between the plaintiff, a stockholder in defendant company, and that company, to recover the claimed value of her stock after sale of the company's entire assets.

The statute gives specific directions as to procedure both by the stockholders and by the directors of the company, if the latter considered the valuation placed by the stockholder on her stock to be in excess of its real value.

Their failure to comply with the statute results in certain consequences as fixed by the statute.

[fol. 101] It is not unconstitutional as suggested by counsel, as the opportunity for the company to protect itself is amply provided for.

The failure to take advantage of the statutory provision may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty.

The issues raised by the plaintiff is whether or not plaintiff has complied with the provisions of the statute.

On this issue the intervening petition is irrelevant.

Reynolds, Judge.

Dated September 30, 1937.

IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY

ORDER GRANTING MOTION TO STRIKE INTERVENING PETITION, ETC.—Filed February 17, 1938

This day this cause came on to be heard upon the motion of the plaintiff to strike the intervening petition of Bertha K. Krauss from the files and to dismiss her as a party herein, and the court being fully advised in the premises finds that said motion is well taken and should be sustained. The court also finds that the motion for rehearing filed on behalf of said intervenor is not well taken and should be overruled.

It is accordingly ordered, adjudged and decreed that said motion of the plaintiff be sustained and that said motion

for rehearing of the intervenor should be overruled, and the intervening petition of the said Bertha K. Krauss is ordered stricken from the files and she is dismissed as a party herein, to which finding and order of the court said intervenor excepts.

[fol. 102] PLAINTIFFS' EXHIBIT No. 1.

Balance Sheet as of May 31, 1936.

The Neilston Warehouse Company.

Assets.			
Cash in bank		$5,737.37	
Accounts receivable		2,655.63	
Prepaid expense on building	$246.38		
Prepaid expense on trucks	66.50		
Prepaid expense public liability	174.66		
Prepaid expense light, heat and water	25.32		
Prepaid expense stationery	35.00		
Prepaid expense workmen's compensation	21.38		
Prepaid expense auto license	68.20		
Prepaid expense taxes, state franchise	121.87	759.31	
Fixtures		676.71	
Delivery equipment		1,561.00	
Land and building		353,499.74	
Sinking fund for taxes		1,811.89	
Treasury stock		11,318.52	$378,020.17
Liabilities.			
Accrued—Interest	$316.25		
Accrued—Taxes, county	3,120.37		
Accrued—Taxes, federal, capital stock	95.00	$3,531.62	
Reserve for doubtful notes and accounts		12,710.89	
Mortgage—Loan		69,000.00	
Capital stock		254,060.00	
Surplus		34,213.12	
Profits and loss		4,504.54	$378,020.17

[fol. 103] IN SUPREME COURT OF OHIO

VOELLER ET AL., Appellees,

v.

THE NEILSTON WAREHOUSE CO. ET AL., Appellants

Constitutional law—Operative effect of law may determine constitutionality—Deprivation of property without notice or opportunity to be heard—Section 1, Article XIV, Amendments to U. S. Constitution—Corporations—Creating conclusive presumption favoring minority stockholders demanding fair cash value—Section 8623-72, General Code—Due process denied majority stockholders.

1. The constitutionality of a law may be determined by its operative effect.

2. A statute, the operative effect of which is to deprive a person of his property without notice and without opportunity to be heard before a competent tribunal, is violative of Section 1 of the 14th Amendment to the federal Constitution.

3. That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process to the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation.

(No. 27724—Decided March 27, 1940.)

Appeal from the Court of Appeals of Franklin county.

STATEMENT OF CASE

This case is here on an appeal as of right and upon the allowance of the defendants' motion to require the Court of Appeals to certify its record.

The salient facts are that in 1925 The G. W. Bobb Company of Columbus, an Ohio corporation engaged in the wholesale grocery business, having encountered financial difficulties, decided to abandon business activities and dispose of its assets. The merchandise was sold promptly. Two pieces of real estate were left. One of these was sold in 1926 and the proceeds applied to the retirement of the preferred stock, the common stock being unaffected. In 1927 the name of the corporation was changed to The Neilston Warehouse Company, and the articles of incorporation [fol. 104] amended to permit engagement in the business of warehousing. Defendants say this was intended as a temporary arrangement, to last only until the remaining real-estate used for warehousing operations could be sold advantageously. Plaintiffs dispute the statement.

At any rate, a proposal for the purchase of such remaining real property was made in April of 1936 and rejected. In May of the same year another offer was made in the sum of $126,950, the prospective purchaser agreeing to assume a first mortgage of $70,000, to pay $25,000 in cash, and to give a note secured by second mortgage for the balance.

At a stockholders' meeting held on June 2, 1936, a majority of the stockholders representing 3,591 shares voted to accept the proposition, while a minority of the stockholders representing 1,125 shares voted against it. The holders of 818 of such minority shares, proceeding in accordance with the provisions of Section 8623-72, General Code, submitted their written objections to the warehouse company within the twenty days specified, and demanded payment of the fair cash value of their shares, placing such value at about $100 per share.

It does not appear that the other stockholders as such were given notice of the objections and demands, or that any meeting of directors or stockholders was called in respect thereto. The only thing done of record was the writing of letters to these minority stockholders, advising them that their demands for payment were unequivocally refused. Such letters bore date of June 26, 1936, and were signed "The Neilston Warehouse Company, by G. W. Bobb, President."

On August 13, 1936, the directors of the warehouse company took official action toward dissolving the corporation, designating The Ohio National Bank of Columbus as liquidating agent. Thereupon the latter took over the cash and [fol. 105] other assets to fulfil its functions as liquidator.

No suit was begun by The Neilston Warehouse Company or the demanding minority stockholders to have the fair cash value of the shares of such minority determined within a six-month period, as provided by the sixth unnumbered paragraph of Section 8623-72, General Code.

However, in January, 1937, six of these dissenting stockholders each filed an action in the Court of Common Pleas of Franklin county against The Neilston Warehouse Company and The Ohio National Bank, as liquidator, praying for judgment in an amount equal to the sum originally demanded as the fair cash value of his shares. These suits were based upon the seventh unnumbered paragraph of Section 8623-72, General Code, providing in substance that if no petition is filed by the corporation or the dissenting stockholders within six months for the determination of the fair cash value of the shares of stock of such dissenting stockholders, the value of such shares shall conclusively be deemed to be equal to the amount offered by the corporation, if any such offer was made, or in the absence thereof an

amount equal to that initially demanded by the dissenting stockholders.

Answering, the defendants challenged the constitutionality of such unnumbered seventh paragraph as it was sought to be invoked, on the ground that it deprived the majority stockholders of property without due process of law, in violation of Section 1 of the 14th Amendment to the United States Constitution.

The six causes were heard together upon the pleadings and the evidence, and judgments were rendered for the defendants by the trial court. Such judgments were grounded principally upon the determination that the dissenting stockholders having made demands on the corporation for amounts substantially in excess of their fair pro rata share of the assets of the corporation to be distributed, and the [fol. 106] majority stockholders as individuals having had no notice of such demands and having been accorded no opportunity to take appropriate action to have the fair cash value determined, the part of Section 8623-72, General Code, creating a "conclusive presumption" that the shares of the dissenters have whatever "fair cash value" they may have demanded, no matter how exorbitant, operated arbitrarily and constituted a denial of due process to the majority stockholders.

A consolidation of the causes was effected and the matter appealed to the Court of Appeals, where the judgment below was reversed by a divided court and the cause remanded for further proceedings.

Mr. O. R. Crawfis and Mr. Carrington T. Marshall, for appellees.

Messrs. Arnold, Wright, Purpus & Harlor, Mr. Earl F. Morris and Messrs. Krumm & Schwenker, for appellants.

OPINION

ZIMMERMAN, J.:

Section 8623-72, General Code, is controlling in this case. It was passed in the interests of minority and dissenting stockholders upon the happening of certain contingencies. The terms of this section, materially affecting the pending case, are that when a majority of stockholders vote to sell the corporate property and assets, the stockholders not voting therefor shall be paid the fair cash value of their shares as of the day before the vote was taken, provided that within twenty days after the vote they object in writing to

such sale and make written demand for the payment of the fair cash value of their shares, stating the number and kind of shares held and the amount claimed as the fair cash value thereof.

Within ten days after receiving the demand the corporation shall advise the demanding stockholders in writing [fol. 107] whether it will pay the amount asked. Upon refusal, it shall make a written counter proposal.

When the corporation and such dissenting stockholders cannot agree upon a price, either may, within six months after the day the vote was taken, petition the Court of Common Pleas of the county in which the corporation has its principal office to determine the fair cash value of such shares.

If no petition is filed by the corporation or the dissenting stockholders within the six-month period, "the fair cash value of the shares *shall conclusively be deemed to be equal* to the amount offered to the dissenting shareholder by the *corporation* if any such offer shall have been made by it as above provided, or in the absence thereof, then *an amount equal to that demanded by the dissenting shareholder as above provided.*" (Italics ours.)

It might be well to observe here that the per share amount demanded by the dissenting stockholders as the fair cash value of their stock is appreciably greater than the per share amount which will be received by other stockholders upon distribution of the amount derived from the disposal of the corporate assets.

The paramount and precise question for decision is whether in the existing circumstances the part of Section 8623-72, General Code, stipulating that the fair cash value of the shares of dissenting stockholders "shall conclusively be deemed to be equal" to the amount demanded by them, has an unconstitutional operation against the majority stockholders, as being violative of the due process section of the 14th Amendment to the federal Constitution.

It is the contention of the defendants that since the statute makes no provision for notice of any kind to the majority stockholders of the demands of the minority and gives them no opportunity to be heard before a competent tribunal in a matter touching their personal interests, the [fol. 108] conclusive presumption contained therein as to the value of the shares of the dissenting stockholders, of which the plaintiffs are attempting to take advantage, de-

prives the majority of their property without due process of law and is therefore unconstitutional in its effect.

Conversely, the plaintiffs and two members of the Court of Appeals take the position that the majority stockholders, having voted to sell the corporate property, thus starting the machinery in motion, should thereafter have kept themselves advised of the steps taken by the minority, and could have "intervened" to protect their interests. Having failed to do so, they have no just cause for complaint as to the "conclusive presumption" of the statute.

The pecuniary and personal interests of two opposing groups of stockholders are primarily involved in a situation like the present one—the majority who voted for the sale of the corporate property, and the minority who did not so vote. After the vote is taken, Section 8623-72, General Code, confines dealings and court proceedings to the corporation on the one hand and dissenting stockholders on the other. Majority stockholders are left entirely out of the equation.

It is well settled that the directors act as the corporation (10 Ohio Jurisprudence, 676, Section 501), and that they are in no sense personal representatives of the stockholders by whose sufferance they hold office. 10 Ohio Jurisprudence, 671, Section 498.

Putting it a little differently, "a stockholder and the corporation of which he is a member, are separate and distinct persons in law, and their interests are always distinct and sometimes adverse." Lawson & Covode v. Farmer's Bank of Salem, 1 Ohio St., 206, 211.

Hence, a stockholder of a corporation is not chargeable with actual knowledge of its business affairs or of notices imparted to it, as is a director. 13 American Jurisprudence, [fol. 109] 471, Section 419; 10 Ohio Jurisprudence, 343, Section 237.

By voting for the sale of the corporate property, the majority stockholders were not thereby chargeable with notice of the demands of the minority, affecting the individual interests of the former in the distribution of funds, which demands were subsequently transmitted to the corporation. The voting and the later conduct of the minority were separate and distinct matters. Geiger v. American Seeding Machine Co., 124 Ohio St., 222, 177 N. E., 594, 79 A. L. R., 614.

From the record in the instant case it does not appear that any of the majority stockholders, outside of the directors, had knowledge of the demands made on the corporation by the minority, or had knowledge that the president of the corporation on his own initiative had written the letters of June 26, 1936, unqualifiedly refusing such demands and making no counter offer.

But assuming, for the purposes of this discussion, that the majority stockholders did have notice or were chargeable with notice of the minority demands, could they have acted in the assertion of their individual rights and, if so, were they obliged to act? It seems to us the question requires a negative answer. In the first place, the controlling statute does not provide for action on the part of the majority; negotiations and resort to judicial proceedings are limited to the corporation and the minority stockholders who have asserted themselves. In the second place, knowledge cannot be imputed to the majority of the arbitrary stand of the company president, or that no court proceedings were intended to be instituted by the corporation or the minority within six months to establish the fair cash value of the shares, as authorized by the statute. And in the third place, no real detriment occurred to the majority until the expiration of the six-month period, when the conclusive pre-
[fol. 110] sumption became absolute, through the failure of the corporation or the demanding minority to move.

Essential elements of due process of law are (1) notice, and (2) an opportunity to be heard. 8 Ohio Jurisprudence, 707, Section 591. Therefore, a statute containing a conclusive presumption, or a presumption which operates to deny a vitally affected person fair opportunity to repel it, violates the due process clause of the Constitution. 12 American Jurisprudence, 317, Section 625.

Such is the effect of the pertinent part of Section 8623-72, General Code, in the present case as to the majority stockholders, and it is therefore unconstitutional in its operation. Of course, "the constitutionality of a law may be determined by its operative effect." Castle v. Mason, 91 Ohio St., 296, 110 N. E., 463, Ann. Cas. 1917A, 164.

We do not consider the present holding in conflict with the case of Geiger v. American Seeding Machine Co., supra (124 Ohio St., 222, 177 N. E., 594, 79 A. L. R., 614). Section 8623-72, General Code (112 Ohio Laws, 37), as it applied

to such case, provided that a minority shareholder voting against the sale of the corporate assets might object in writing, within twenty days of the vote authorizing the sale, and demand the payment of the fair cash value of his shares.

"In case of disagreement * * * the dissatisfied shareholder may, within six months after such demand is made, but not thereafter, petition the Court of Common Pleas * * * to appoint * * * three appraisers to determine the fair cash value of the snares * * *."

It is to be noted that the section as it then read contained no provision as to the corporation fixing and offering a fair cash value, no "conclusive presumption" upon failure to act, and was quite different from its existing form.

[fol. 111] In the phase of the Geiger case involving Section 8623-72, General Code (112 Ohio Laws, 37), no constitutional question seems to have been raised, and it was held that the single minority stockholder who followed the procedure outlined by such section was entitled to receive the fair cash value of his stock.

The Geiger case is also distinguishable on its facts. There, in the absence of any controlling statute, a preferred stockholder brought a chancery action to enjoin the corporation from distributing the proceeds derived from the sale of the corporate assets unless and until the preferred stockholders received the par value of their stock plus dividends. Taking the view that the controversy was in fact between the preferred and common stockholders as the real parties in interest, and that the corporation was nothing more than a "stakeholder," the court held that under the circumstances it was not error to permit the individual stockholders to become parties, plead their claims, and prosecute error, especially when the corporation had announced its intention to abide by a lower court decree, which proved satisfactory to neither the preferred nor common stockholders.

In giving the preferred stockholders a partial advantage, the court rested its decision on the contractual significance to be attached to the stock certificates and the articles of incorporation.

Six members of this court are of the opinion that the part of Section 8623-72, General Code, under discussion, has an unconstitutional operation in this case, for the reasons hereinbefore expressed.

Notwithstanding the adverse decision on the constitutional question, plaintiffs contend they are entitled to prevail on two other grounds, viz., estoppel and res judicata.

As to estoppel, the argument is that the corporation and the majority stockholders, having invoked Section 8623-65, [fol. 112] General Code, to sell the property, which section refers to and makes Section 8623-72, General Code, a part thereof, will not be permitted to claim the unconstitutionality of any portion of the latter section.

The answer to this is that Section 8623-72 is not made a part of Section 8623-65. In fact, they are separate and distinct and cover different subjects. Section 8623-65 authorizes a corporation to sell its entire assets upon notice to all stockholders and upon a favorable vote at a called meeting, while Section 8623-72 deals entirely with the rights of the dissenting stockholders after the vote, making no provision for the participation by the majority in affairs directly affecting their pecuniary interests.

As to res judicata, it appears that some three months after the petition was filed in the pending action and subsequent to the filing of an answer and a number of motions, one of the majority stockholders on her own behalf and on behalf of all other stockholders similarly situated, filed an intervening petition in the cause. Upon motion, the petition was stricken from the files by the trial court and the case proceeded with the original parties. The order entered on the motion pertained to a procedural matter involving only proper parties to the action and cannot be construed as a determination on the merits. And of course the rule is that an order or judgment to operate as res judicata must have been rendered on the merits of the case. 15 Ruling Case Law, 955, Section 431; 34 Corpus Juris, 774, Section 1193; 2 Black on Judgments (2 Ed.), 1043, Section 693; 2 Freeman on Judgments (5 Ed.), 1557, Section 738.

The members of this court concurring in the judgment are of the opinion that neither the doctrine of estoppel nor res judicata has application here.

[fol. 113] The judgment of the Court of Appeals is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.

Weygandt, C. J., Day, Williams and Matthias, JJ., concur.

SEPARATE OPINION

HART, J.:

I concur in the syllabus but dissent from the judgment on the ground that the defendants, having invoked the powers created by Section 8623-65, General Code, to bring about a sale of the corporate property, are, under authority of New York Central Rd. Co. v. City of Bucyrus, 126 Ohio St., 558, 186 N. E., 450, now estopped to question the constitutionality of that part of Section 8623-72, General Code, which creates a conclusive presumption in favor of minority shareholders. I am also of the opinion that res judicata is not a valid defense.

DISSENTING OPINION

MYERS, J., dissenting:

The importance of the question requires a statement of reasons for disagreement with the majority opinion. A corporation being an artificial entity, its creation and dissolution are necessarily controlled by statutes. Persons acquiring stock in a corporation are charged with notice not only of the charter and by-laws of the corporation but of all statutes governing the corporation including dissolution or sale of the entire property thereof. That being true, the statutes on the particular subject involved become a part of the contract of subscription. The statute in question was enacted primarily for the protection of minority stockholders in the event of sale of the entire property of the corporation. It was enacted in order to prevent abuses that formerly attached to such operations.

It is claimed that part of the statute creating a presumption of value is unconstitutional, that under the facts of [fol. 114] the instant case it is a taking of property without due process of law. In order to determine whether there has been due process of law the entire corporate structure must be examined. In the first place stockholders join in the selection of the board of directors which transacts the business of the corporation. Such board thus elected may through unwise management endanger the entire assets of the corporation and yet no one would make the claim that sustaining such loss would be without due process of law. Thus also in respect to the sale of the entire property of a corporation the statutes provide that action must first be

taken by the board of directors but no one makes the claim that such action is not due process of law. The next step is submission of the question to all of the stockholders. The result is again controlled by the stockholders. No one claims that such action is the taking of property without due process of law. It is only near the end of the process of sale of the entire property in the instant proceeding that the claim of unconstitutionality is raised.

When the majority stockholders voted upon the question of the sale of the property of the corporation they were charged with notice of the provisions of the statute. They set in operation the statute here involved. In doing so, they take the statute not only with its benefits but also with its infirmities, if any there be. It is not unlike the first step of a contract. Especially so since under Section 8623-72, General Code, a dissenting stockholder may not, without consent of the corporation, withdraw his demand for payment "of such fair cash value," once it is made. If in the light of later events he has demanded too little, he is bound by the procedure even as is the majority. In the instant case a procedure was outlined by the board of directors which the majority stockholders could authorize or not as they saw fit. If the majority stockholders are of the opinion [fols. 115-116] that the procedure is inequitable they have only themselves to blame if they set the machinery in motion. One may not voluntarily initiate a procedure outlined in a statute and thereafter ask to be relieved from the effects of its operation on the claim of the statute's invalidity. Here the dissenting stockholders were not responsible for the situation in which the majority found themselves. Furthermore, the property having been sold, the majority are not in a position to place the dissenting stockholders in statu quo.

The claim is made that under a presumption created by statute property is taken without due process of law. But the presumption becomes operative only upon action by the board of directors ratified by a majority of stockholders. There are many presumptions in the common law that under certain circumstances operate to the advantage of one party or another. That being true can it be said that presumptions to operate under other circumstances may not be created by statute? Indeed, it is universally recognized in our system of jurisprudence that every reasonable presumption will

be indulged that a statute is constitutional and that no law will be held invalid unless it clearly contravenes the provisions of the Constitution.

To hold the questioned part of the statute unconstitutional would be to render inoperative and futile the very purpose of the entire statute which was to protect minority stockholders. To hold this part of the statute unconstitutional would be to restore the very abuses by the majority which the statute was intended to prevent.

[fol. 117] IN SUPREME COURT OF OHIO

OLGA E. VOELLER, ET AL., Plaintiffs and Appellees,

vs.

THE NEILSTON WAREHOUSE COMPANY AND THE OHIO NATIONAL BANK OF COLUMBUS

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1939, July 8. Notice of appeal and proof of service filed.

1939, July 15. Motion for an order to certify record, assignments of error and proof of service filed.

1939, July 18. Court of Appeals transcript, original papers and bill of exceptions filed.

1939, July 18. Cause docketed on appeal as of right.

1939, July 18. Appellants' printed brief on motion and affidavit of service filed. 7/19/39 proof of service filed.

1939, September 12. Printed brief of appellee on motion and affidavit of service filed.

1939, September 14. Acknowledgment of service filed.

1939, September 16. Motion by appellee to dismiss appeal filed as of right filed. 9/19/39 proof of service filed.

1939, September 23. Brief of appellant opposing motion to dismiss appeal and proof of service filed.

1939, September 26. Appellees' reply brief filed (9) and proof of service filed.

1939, September 26. 8 additional copies of appellees' motion to dismiss and memorandum in support of motion filed.

1939, October 4. Motion for an order directing the Court of Appeals of Franklin county to certify its record, allowed. Journal 35, page 496.

[fol. 118] 1939, October 4. Motion by appellee to dismiss appeal as of right overruled. Journal 35, page 496.

1939, October 4. Order No. 1941 issued to clerk of courts to certify record.

1939, October 6. Certificate from Court of Appeals filed.

1939, October 10. Papers taken by Earl F. Morris and given to Rodenfels.

1939, October 10. Cause stands for hearing on its merits.

1939, October 30. Printed record and affidavit of service filed. 11/1/39 proof of service filed.

1939, November 4. Printed brief of appellant on motion refiled on merits and acknowledgment filed.

1939, November 7. Appellees' printed brief on motion refiled on the merits, notice and proof of service filed.

1939, November 10. Printed supplemental record and affidavit of service filed. 11/13/39 proof of service filed.

1939, December 6. Printer's receipted bill filed.

1940, January 8. Appellants' printed reply brief filed. 1/9/40 proof of service filed.

1940, January 19. Letter submitted by appellees filed.

1940, March 27. Judgment of the Court of Appeals reversed and judgment of the Court of Common Pleas affirmed. Journal 35, page 680.

1940, April 2. Hold mandate and papers—going to file application for rehearing

1940, April 12. Entry extending time for filing application for rehearing herein to April 16, 1940. George S. Myers, J. Journal 35, page 693.

1940, April 13. Motion by appellant for an order vacating order made April 12, 1940, giving appellee until April 16 to file application for rehearing and memorandum filed.

1940, April 16. Memorandum of appellee opposing motion to vacate (9) filed and proof of service filed.

1940, April 17. Motion by appellants to vacate order entered giving appellees until April 16, 1940, for filing [fol. 119] application for rehearing sustained. Journal 35, page 694.

1940, April 17. Entry ordering withholding of mandate pending petition for certiorari to U. S. Supreme Court approved. Carl V. Weygandt, C. J. Journal 35, page 698.

Journal Entries

Wednesday, October 4, 1939. Motion for an order directing the Court of Appeals of Franklin county to certify its record. It is ordered by the court that this motion be and the same is hereby allowed. Journal 35, page 496.

Wednesday, October 4, 1939. Motion by appellee to dismiss appeal filed as of right. It is ordered by the court that this motion be and the same is hereby overruled. Journal 35, page 496.

Wednesday, March 27, 1940. Appeal from the Court of Appeals of Franklin county. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, affirmed. It is further ordered and adjudged that the appellants recover from the appellees their costs expended in this court and in the Court of Appeals, taxed at $——. Ordered, that a special mandate be sent to the Court of Common Pleas of Franklin county, to carry this judgment into execution. Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Franklin county, "for entry." Journal 35, page 680.

Friday, April 12, 1940. Entry. Upon application of [fol. 120] the plaintiffs-appellees in the above-entitled cause and for good cause shown, it is ordered that plaintiffs-appellees be given until Tuesday, April 16, 1940, to file application for rehearing in this cause and that the mandate be withheld until the decision on the application for rehearing is announced. George S. Myers, judge of the Supreme Court. Journal 35, page 693.

Wednesday, April 17, 1940. Motion by appellants for an order vacating order entered herein giving appellees until April 16, 1940, for filing application for rehearing and withholding mandate. It is ordered by the court that this motion be and the same is hereby sustained. Journal 35, page 694.

Wednesday, April 17, 1940. Entry. It is stipulated between the plaintiffs-appellees and defendants-appellants in this cause, that pending a petition for writ of certiorari from the Supreme Court of the United States, which plaintiffs-appellees hereby declare their purpose to file in the Supreme Court of the United States at an early date, that the mandate of the judgment of the Supreme Court of Ohio in the appeal in the above-entitled cause may be with-

held from the Court of Common Pleas until a writ of certiorari shall be denied, or in the event of the allowance of said writ until the final disposition of said cause on appeal in the Supreme Court of the United States. Carl V. Weygandt, chief justice of the Supreme Court. Journal 35, page 698.

STATE OF OHIO,
City of Columbus, ss.:

I, Seba H. Miller, clerk of the Supreme Court of the state of Ohio, do hereby certify that the foregoing transcript of docket and journal entries in the Supreme Court of Ohio is truly taken and correctly copied from the records of said court in the within entitled cause.

Witness my hand and the seal of said Supreme Court of Ohio, affixed at Columbus, Ohio, this seventh day of May, A. D. 1940.

Seba H. Miller, Clerk of the Supreme Court of Ohio.
(Seal.)

[fol. 120a] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 121] COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

No. 151,264

OLGA E. VOELLER et al., Plaintiffs,

vs.

THE NEILSTON WAREHOUSE CO., et al., Defendants

DECISION—Rendered September 30, 1937

On rehearing the motion of plaintiff to strike from the files the intervening petition of Bertha K. Krause is sustained.

Leave to file the intervening petition was granted in an ex parte hearing without notice to plaintiff, and unless relevant, and material to the issues in the case, it has no place in the case.

The action here is between the plaintiff, a stockholder in defendant company, and that company, to recover the claimed value of her stock after sale of the company's entire assets.

"The statute gives specific directions as to procedure both by the stockholders and by the directors of the company, if the latter considered the valuation placed by the stockholder on her stock to be in excess of its real value.

Their failure to comply with the statute resulted in certain consequence as fixed by the statute.

It is not unconstitutional as suggested by counsel, as the opportunity for the company to protect itself is amply provided for."

The failure to take advantage of the statutory provision may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty.

The issues raised by the plaintiff is whether or not plaintiff has complied with the provisions of the statute.

On this issue the intervening petition is irrelevant.

Reynolds, J.

[fol. 122] Certificate

STATE OF OHIO,
Franklin County, ss:

I, J. Arthur Yoder, Clerk of the Court of Common Pleas of Franklin County, Ohio, do hereby certify that the fore-

going is a true copy of the decision rendered in the above cause on the 30th day of September, A. D. 1937, by Dana F. Reynolds one of the Judges of said Court, as appears by the original decision on file in the office of said Clerk of Courts.

Witness my hand and the seal of said Clerk of Courts this 20th day of May A. D. 1940.

J. Arthur Yoder.

[fol. 123] COMMON PLEAS COURT, FRANKLIN COUNTY, OHIO

No. 151,305

MAYE B. WILLIAMS, Plaintiff,

vs.

THE NEILSTON WAREHOUSE Co., et al., Defendants

DECISION—Rendered on the 30th day of July, 1938

LEACH, J.:

Without prefacing this memorandum of opinion with a statement of facts, which are not in substantial controversy, the Court will proceed at once to a brief discussion of the question which the Court conceives to be the heart of the controversy and which in his opinion is decisive thereof.

That question is the constitutionality of an alleged "conclusive presumption" established under the facts of these cases by Section 8623-72 G. C.

Said section sets forth a method of procedure to be followed by dissenting stockholders and the corporation, and when either or both avail themselves of the remedies therein outlined, and when such procedure is followed, as the statute generally contemplates, there can be little doubt of the constitutionality of the statute when so operated. Such operation of statute was held constitutional in Miller v. Canton Motor Coach Inc., December 30, 1937; 58 Ohio App. 94; also reported in Ohio State Bar Association Report Issue of June 27, 1938.

However, "a statute not objectionable on its face may be adjudged unconstitutional *because of its effect in opera-*

tion'' 12 C. J. p. 787; Minnesota v. Barber, 136 U. S. 313; State v. Clement National Bank, 84 Vt., 167; Castle v. Mason, 91 Oh. St. 296.

In these instant cases the plaintiffs' allegations in their petitions that the fair cash value of their stock was a certain amount, to wit, the amount set forth in their written demands was not admitted in the amended answers or in open court at the trial; ''nor'', to quote the language from plaintiffs' brief, ''was any attempt made to prove such allegation, because in view of the other allegations'' the [fol. 124] same was claimed to be immaterial by reason of the statutory ''conclusive presumption''.

From all the evidence it is apparent that if said ''conclusive presumption'' is valid and constitutional and plaintiff should otherwise prevail, the result would be to give to plaintiff dissenting stockholders a very material and substantial advantage in the distribution of the assets of the corporation over those not so dissenting. Each of plaintiffs would receive $100.00 per share while the non-dissenters would receive very much less than that amount per share, and what plaintiffs would receive over and above the fair value of each share would be at the expense of the other stockholders.

Under the statute, either the plaintiffs or the corporation might, within six months after the day on which the vote was taken, have petitioned the Court to determine the fair cash value of the shares mentioned in the demands of said stockholders, plaintiffs, as of the day before the vote was taken to which objection was made.

None of the plaintiffs took such action and neither did the corporation. The statute then provides:

''If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then *an amount equal to that demanded by the dissenting shareholder as above provided.*''

No amount having been offered by the corporation, it is upon this latter statutory ''conclusive presumption'' that plaintiffs rely.

Reference to the section involved, as above stated, shows that the plaintiffs might have petitioned the Court to have had determined the fair cash value of their shares; the corporation could have done likewise. But (and this, as the Court views the situation, is the crux of the matter), could the other stockholders, so have petitioned the Court, or taken any other action to safeguard their personal interests in this regard?

The statute makes no provision therefor. In response to the demands only those making the demands and the corporation itself could, under the statute, take action. The corporation could and should have acted, but the corporation could only have acted through its board of directors. Sec. 8623-55.

While the board of directors are representatives of the corporation, they are not the personal representatives of the shareholders in intercorporate disputes among shareholders, and the directors are not the agents of the share- [fol. 125] holders in any such sense. Corporate rights as such, are not here involved, but rather individual rights as shareholders. If the board of directors were the only shareholders other than the claimants, doubtless notice to and demand of them, and failure to act on their own personal behalf would supply all the requisites of due process as to them, on a claim based on such a conclusive presumption so created by statute.

But here the majority of the stockholders had no statutory or other right to act personally on their own personal behalves, by way of filing a petition to have determined the fair cash value of the plaintiffs' shares of stock. They were at the mercy of the directors, whose action they could not control or direct.

It is a familiar law that one of the constitutional requisites of due process is a hearing or "opportunity to be heard before a competent tribunal." Luff v. State, 117 O. S. 102.

As we have stated heretofore, we are of opinion that the statute in question, Sec. 8623-72 G. C., works out fair and constitutional machinery where either the corporation or the dissenting stockholder avails of the remedies therein afforded; but where, as here, a stockholder makes demand for an amount very substantially in excess of his fair pro

rata share of the assets of a corporation, and the majority stockholders individually have been given no opportunity to take appropriate action to have the fair value determined, a statute, purporting, under such peculiar circumstances, to create a "conclusive presumption" that the shares of the said dissenters have whatever "fair cash value" that may have been demanded, no matter how excessive may have been the demand, is in the Court's opinion arbitrary, and lacking in an essential requisite of due process.

Cases need not be multiplied, but the statement contained in the case of Manley v. Georgia, 279, U. S. 3, is illustrative of the undenied principle:

"A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. * * * Mere legislative fiat may not take the place of fact in the determination of issues involving life liberty or property."

Here the corporation as such had a "fair opportunity", but since the board of directors failed to act, and such [fol. 126] failure could not legally have been prevented by the stockholders who would be materially injured by such failure, said stockholders as such have not had such "fair opportunity", and so, in the Court's opinion the conclusive presumption fails, and with it the cases of the plaintiffs. Judgment on the issues joined for the defendants.

Mr. O. R. Crawfis, Attorney for Plaintiffs, Messrs. Arnold, Wright, Purpus and Harlor, Attorneys for Defendant.

[fol. 127] CERTIFICATE

STATE OF OHIO,
Franklin County, ss:

I, J. Arthur Yoder, Clerk of the Court of Common Pleas of Franklin County, Ohio, do hereby certify that the foregoing is a true copy of the decision rendered in the above cause on the 30th day of July, A. D. 1938, by Charles A. Leach one of the Judges of said Court, as appears by the original decision on file in the office of said Clerk of Courts.

Witness my hand and the seal of said Clerk of Courts this 20th day of May, A. D. 1940.

J. Arthur Yoder. (Seal Common Pleas Court, Franklin County, Ohio.)

[fol. 128] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 3001

OLGA E. VOELLER, et al., Plaintiffs-Appellants,

v.

THE NEILSTON WAREHOUSE COMPANY, et al., Defendants-Appellees

DECISION—Rendered on the 9th day of May, 1939

Statement of Case by BARNES, J.
Conclusion of Opinion by GEIGER, J.

The above entitled cause is now being determined as an error proceeding by virtue of plaintiffs' appeal on questions of law from the judgment of the Court of Common Pleas of Franklin County, Ohio.

In the Common Pleas Court causes Nos. 151,265, 151,266, 151,267, 151,268 and 151,305 were consolidated with cause No. 151,264, and jointly tried to the court, jury being waived. Each of these causes was identical in principle, the only difference being in the name of the plaintiffs and the amount sought to be recovered. The consolidation in the lower court brings all the cases into this court under one bill of exceptions and the decision will apply to all original separate causes.

The Ohio National Bank of Columbus, Ohio, was named a defendant, the petition alleging that on August 13th, 1936, the board of directors of the defendant corporation, the Neilston Warehouse Company, unanimously joined in a resolution to dissolve said corporation, and that it did thereupon transfer all of its remaining assets to the defendant, the Ohio National Bank of Columbus, as liquidator and thereafter said the Neilston Warehouse Company, through its board of directors, did on September 15, 1936, file in the office of the Secretary of State of Ohio a certificate of its dissolution as a corporation.

The following statement of facts is essential to an understanding of the controversy:

[fol. 129] Prior to July 6, 1927, the G. W. Bobb Company, an Ohio corporation, located in Columbus, Ohio, and engaged in the wholesale grocery business, by duly author-

ized action, made sale of its wholesale grocery business, including its good will.

This sale did not include two separate pieces of real estate. Within two years one piece of real estate, by duly authorized action, was disposed of and the proceeds of the sale went to the retirement of preferred stock issued by the said Bobb Company. On July 6, 1927, the name of the Bobb Company was changed by amendment of its articles of incorporation duly filed in the office of the Secretary of State of Ohio, from the G. W. Bobb Company to the Neilston Warehouse Company. The purpose and object of the corporation was also changed.

The original stock issued by the G. W. Bobb Company under that name was not reissued under the name of the Neilston Warehouse Company. This is not material to the issues and is only mentioned as an historical fact.

The plaintiff Olga E. Voeller, was the owner of 40 shares of stock of the par value of $4,000.00, having acquired same September 2, 1919.

The other plaintiffs had various varying amounts of similar stock issued at different times.

On May 20, 1936, the board of directors of the defendant corporation, at a board meeting, approved the sale of the company's real estate, located at the northwest corner of Naghten and Neilston Streets, Columbus, Ohio, to the Creasy Corporation, of Louisville, Kentucky, for the sum of $126,850.00.

Acting in conformity to Section 8623-65 of the General Code of Ohio, a special meeting of the shareholders of said defendant corporation was called June 2, 1936, for the purpose of submitting to the stockholders the proposition of purchase and the action of the board thereon, and at said meeting 4783 shares issued and outstanding, were present, either in person or by proxy. 295 of the issued and outstanding shares were not present. The total issue was 3078 shares; 3591 of which shares, or more than two-thirds of all such shares, were voted in favor of the proposed sale; 1192 shares voted against the proposed sale. The six plaintiffs were among the minority stockholders voting against the sale.

[fol. 130] Wi-hin twenty days the six plaintiffs, acting separately, and with intended compliance with Section 8623-72,

G. C., filed with the proper officer of said corporation objections in writing to the action so taken at such shareholders' meeting, and demanded in writing of said defendant corporation the payment of the fair cash value for their shares, which was set out to be $100.00 per share, or as to the plaintiff Voeller, a total of $4000.00. In one of the remaining five shares the fair cash value was designated at a lesser amount.

The defendant corporation failed to act under the provisions of Section 8623-72, G. C., which provides as follows:

"Within ten days after receipt of any such demand the corporation shall inform such shareholder in writing whether it will pay the demanded amount, and, if it refuses to pay such amount, it shall offer in writing to pay an amount as and for such fair cash value."

But on June 26, which was within ten days after the receipt of the respective demands for payment, the corporation did write to each of the claimants a letter, of which the following is a copy, excepting the name and address of the addressee:

"Your demand for payment is refused. The purpose of which the Neilston Warehouse Company was incorporated has been abandoned." Signed: "The Neilston Warehouse Company, by G. W. Bobb, President".

A further pertinent provision of Section 8623-72 G. C., reads as follows:

"If the corporation shall not agree to pay the amount demanded, or the dissenting shareholder shall not agree to accept the amount offered by the corporation, the corporation or the dissenting shareholder, if he has complied with all the conditions of this section, may, within six months after the day on which the vote was taken but not thereafter, petition the court of common pleas of the county in which such corporation has its principal office to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken to which objection was made as aforesaid."

Neither the corporation nor the dissenting shareholders within the six months period filed any action in the Court of Common Pleas of Franklin County to determine the fair

cash value of the share mentioned in plaintiff's respective demands.

The following paragraph of this section, which is generally spoken of in the briefs as Paragraph No. 7 (although not numbered as it appears in the Code) is all important, as it is the predicate for plaintiffs' action and claimed to be unconstitutional by defendants. This paragraph is quoted [fol. 131] in full:

"If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer was made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

The cause was tried on the amended petition, second amended answer, amended reply and the evidence. Very little controversy of substance appears in the facts. The controverted question is largely, if not entirely, one of law.

The trial court found Paragraph 7 to be uncons-itutional and dismissed plaintiffs' petition. The constitutionality of this paragraph of said Section 8623-72, G. C., has not been passed upon, so far as we are advised, by any court in Ohio until the decision of the trial court in the instant case.

Statement is made by counsel for appellee in their brief that in other states of the United States having similar corporation laws to Ohio, only one has a provision similar to Paragraph 7 and that is the State of Rhode Island, whose corporation law is allegedly copied from ours. No decision of any other state directly in point is referred to or cited. It therefore follows that we have before us an original question without the aid of precedent, unless by analogy decisions on kindred questions may be helpful.

Very able and comprehensive briefs have been submitted by counsel representing the parties.

Being an original question, these briefs have taken a very wide scope and a great many cases are cited and commented upon. In almost every instance where a case is cited and comments made, opposite counsel concede the soundness of the announced principle, but counter with the observation that such case is not applicable to the instant case.

The basis of the claimed unconstitutionality of paragraph 7 of said section is by reason of the conclusive presumption as to the value of said stock. It is urged that this provision would enable the dissenting stockholders to receive much more than their pro rata share from the assets of the corporation and therefore is taking property actually belonging to the majority stockholders without due process.

In answer to this claim, counsel for plaintiffs present the argument that the defendant corporation is accorded a remedy under the statute through which the value of the stock held by the dissenting stockholders might have been determined by court action. Not having availed themselves [fol. 132] of the statutory remedy, they are estopped to question the provisions of Paragraph 7 which conclusively fixes the value as the amount stated in plaintiffs' demand.

Counter to this principle, counsel for defendants assert that in reality the controversy or its effect is between stockholders and that the failure of the board of directors of the corporation to act in accordance with the provisions of paragraph 6 of said section would not warrant a conclusive presumption of excessive value and thereby take from the majority stockholders what in law belongs to them.

The further question is raised as to the rights and duties of the majority stockholders in taking action under paragraph 6 in the event the board of directors did not so do. There is no question that a stockholder of a corporation may, in a proper proceeding, compel action by the board of directors where such action is proper and necessary in order to promote the interest of the corporation. Applying this principle to the instant case, it appears that no provision is made in the section of the Code for dissenting stockholders in presenting their claims to notify other stockholders. Nor is there any provision of the law requiring the board of directors to call a meeting of the stockholders to take action on such presented claims. There is nothing in the record to indicate that any of the stockholders, other than the claimant and the board of directors, had any knowledge that such claims were presented or that the board of directors were taking no action thereon. In the absence of a meeting of the board of directors and an entry in their minutes showing affirmative vote declining to take action, the stockholders could not know that such action would not be taken by the board of directors until

the last minute of the last hour of the last day, and then it would be too late.

We are constrained to the view that plaintiffs' cause must stand or fall on the claim filed with the board of directors and not on any obligation of the majority stockholders to cause paragraph 6 to have been complied with.

Counsel for plaintiffs, in supplement to their original brief, raise the question of res adjudicata as against all stockholders other than the claimants.

It appears that while the cause was pending and before hearing, a stockholder of the corporation sought and ob- [fol. 133] tained leave to file an intervening plea. This stockholder was represented by the same counsel who represented the corporation. This stockholder claimed in his pleading to appear on behalf of himself and all other stockholders similarly situated. This pleading was very similar to that filed by the company. Among other things, it set up the injurious effect on the majority stockholders if plaintiffs' claim was allowed under the conclusive presumption provided in paragraph 7. It also raised the question of the constitutionality of this paragraph. Thereafter counsel for plaintiffs filed motion to strike the intervening pleading from the files and upon hearing this motion was sustained. Counsel for plaintiffs make the claim that this was a final order and not having appealed therefrom it is binding not only on the stockholder filing the petition, but on all other stockholders similarly situated. We are unable to bring ourselves to the conclusion that this constitutes res adjudicata. The adjudication did no more than dismiss the interpleader from the action. It in no sense was a hearing on the merits, and it is our understanding that this was necessary to support a claim of res adjudicata.

In approaching the ultimate question, counsel for plaintiffs in their brief, in addition to what has heretofore been stated, call attention to the following principles:

1. All reasonable doubts must be resolved in favor of the validity of legislation.

Citing 8 Ohio Jurisprudence, page 166, Sections 63 and 64.

2. The statute should be liberally construed in favor of the minority stockholders.

Citing Miller v. Canton Motor Coach, 133 O. S., 384, and decisions from other states.

We are unable to glean any assistance from this principle on the question of constitutionality.

3. Has the corporation availed itself of its legal remedies or complied with conditions precedent?

Citing nine cases decided by our own Supreme Court and also a decision by the United States Supreme Court.

We have examined these cases, but they fall short of determining our questions, although helpful in the approach.

[fol. 134] 4. Due process—what is it?

Citing Cleveland v. Luttner, 92 O. S., 493, and five cases decided by the United States Supreme Court.

We have likewise examined these authorities and these, too, are helpful in our approach to the ultimate question.

5. Estoppel by accepted benefits.

Citing N. Y. Central Railroad Company v. Bucyrus, 126 O. S., 558, and also six cases decided by the United States Supreme Court. Under this heading the claim is made that since the corporation invoked the provisions of the corporation code to effect a sale of property against the desires of the minority stockholders, that therefore they are estopped to question the other pertinent provisions providing rights and remedies to the minority stockholders.

This principle is generally sound, but we do not think it meets the question of the constitutionality of Paragraph 7.

Counsel for defendant, in their brief, as an additional ground for attacking the constitutionality of Paragraph 7, raise the question of impairment of contract. This question is raised by reason of the claim that substantially all of the stockholders of the Neilston Warehouse Company acquired their shares before Section 8623-72, G. C. as amended in July, 1929, became effective, and that by reason thereof their rights were fixed by their contracts and the laws then in force which made no reference to any conclusive presumption.

On January 20, 1939, our court decided the case of John T. Harbine, Jr., v. The Dayton Malleable Iron Company, No. 1520, Montgomery County, Ohio, in which we had under consideration this identical question. In that case we held that there was not an impairment of contract by reason of reserve power in the state to make amendments to corporation laws. The principle is well recognized that while the certificate of stock is a contract, that likewise the constitu-

tional provision and legally enacted law was part of the contract and there being the right to amend, such amendments of law when coming within the reserve power of the state, also are part of the contract. It is our conclusion that no relief can be granted under the claim of impairment of contract.

We now pass to the direct question as to the constitutionality of said Paragraph 7 of Section 8623-72, General Code. [fol. 135] Counsel for plaintiffs cite the case of Williams v. National Pump Corporation, 46 O. App., 427. This case arose in Montgomery County, and was decided January 26, 1933, Kunkle, J., rendering the opinion, and concurred in by Allread, P. J., and Hornbeck, J. In the reported case the question arose under amendments to articles of incorporation and the rights of compensation for dissenting stockholders. The section was declared constitutional as it applied to the facts of that case, but Paragraph 7 was not involved, and hence the reported case is not determinative of the instant case.

There is also cited Miller v. Canton Motor Coach (unreported, motion to certify denied), 133 O. S., 384. The Court of Appeals in this case also passed on the constitutionality of certain provisions of Section 8623-72, G. C., but the provisions of Paragraph 7 were not before the court.

Counsel for defendant quote from Professor Cooley in his Principles of Constitutional Law, at page 330:

"A statute which should undertake to establish conclusive rules of evidence whereby a party might be excluded from any opportunity to show the facts on affirmative presentation of his adversary's case, would be nothing short of a statute of confiscation and manifestly in violation of constitutional rights."

To this point this decision has been written by the member of our Court who arrives at a final conclusion with which the majority of the Court is unable to agree. He has so carefully and lucidly presented the questions at issue and has analyzed so well the claims of counsel and also has given such attention to cited cases with all of which the majority agrees, that we feel it would be a lack of deference to him to discard what he has so well said and repeat it to the same effect in probably different terms.

We have examined the following cases and do not find them so pertinent to the interpretation of the statute as to

call for any comment: Williams and Thomas Company v. Preslo, 84 O. S., 328; Steele, Hopkins & Meredith v. Miller, 92 O. S., 115; Hammond v. State, 78 O. S., 15; State v. Cincinnati Tin & Japan Co., 66 O. S., 182; State, ex rel. v. Cook, 41 O. App., 149; Nanley v. Georgia, 279 U. S. 575 (73 Law Ed.); Atlantic R. R. v. Henderson, 279 U. S. 639, (73 Law Ed. 884); Hiner v. Donnan, 284 U. S., 312, (76 Law Ed.) 772.

A case that probably states the contention of the parties as strongly as may be done is that of Schlesinger, Exrs., v. Wisconsin, 270 U. S., 230, (70 Law Ed. 555). The Supreme Court of the United States there held that:

[fol. 136] "(1) A conclusive statutory presumption that all gifts of a material part of the decedent's estate made by him within six years of his death—whereby they became subjected without regard to his actual intent in making the gifts to graduated inheritance tax—creates an arbitrary classification and conflicts with the 14th amendment."

The statute under examination provided in substance that every transfer made within six years prior to the death of the grantor shall be construed to have been made in contemplation of death within the meaning of the section. The Court holds that the challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and can not be overcome by evidence. It is no more prima facie presumption of fact and the court holds that it violates the 14th Amendment.

It is not difficult to distinguish the facts in that case from those at bar. There was no opportunity afforded to overcome the conclusive presumption and the estate became subject to the inheritance tax from the mere fact that the gift was made within six years of the death of the testator irrespective of what were the actual facts. We think this case is illustrative of distinctions that can be readily made in reference to the other cases cited but not commented upon.

Judgment Appealed from.

The judgment from which appeal is taken is found in the entry of November 10, 1938. The Court therein finds that

the provisions of the 7th paragraph of Section 8623-72, G. C., in so far as they undertake to create or establish a conclusive presumption as to the fair cash value of shares of dissenting stockholders are, under the facts in this consolidated case, unconstitutional and void as being in contravention of the due process clause of Section 1 of the 14th Amendment of the United States Constitution and the plaintiffs are accordingly not entitled to the relief prayed for.

We examined the decision of the Court dated July 30th, 1938, upon which the judgment is based and epitomized it as follows:

The question is the constitutionality of an alleged "conclusive presumption" established under the facts by Section 8623-72. The Court points out that there can be little doubt as to the constitutionality of the procedure to be followed [fol. 137] by a dissenting stockholder and quotes cases supporting that view, and further states that from the evidence it is apparent that if the "conclusive presumption" is valid and the plaintiff should otherwise prevail, the result would be to give to the dissenting stockholders a substantial advantage in the distribution of the assets, over those not dissenting. The court states in substance that the section involved shows that the plaintiffs might have petitioned the court to have had determined a fair cash value; the corporation could have done likewise. But (and this as the court views the situation is the crux of the matter) could the other stockholders so have petitioned the court or taken any other action to safeguard their personal interests in this respect? The statute makes no such provision. Only those making demands from the corporation could under the statute take action. The corporation could have acted but only through its board of directors; while the directors are representatives of the corporation they are not the personal representatives of the shareholders nor their agents in intercorporate disputes. Corporate rights as such are not involved; the majority of the stockholders had no statutory right to act personally by way of filing a petition to have determined the cash value of the plaintiff's shares; they were at the mercy of the directors whose actions they could not control or direct; the constitutional requisite of due process is a hearing or opportunity to be heard. The statute furnishes constitutional machinery where either the corporation or the dissenting stockholder avails of the remedies afforded;

but where as here a stockholder makes demands for an amount substantially in excess of his pro rata share of the assets and the majority stockholders individually have been given no opportunity to take appropriate action to have the fair value determined, a statute purporting to create a "conclusive presumption" that the shares of the dissenters for whatever "fair cash value" that may have been demanded no matter how excessive, is in the court's opinion arbitrary and lacking the essential requisite of due process. The court quotes from Manley v. Georgia, 275 U. S., 3, as illustrative to the effect that a statute creating a presumption that is arbitrary or denies a fair opportunity to repel it violates the due process clause of the Constitution. Legislative fiat may not take the place of fact in determining issues. The court concludes that the corporation as such has a fair opportunity but since the board failed to act and such failure could not have been prevented by the stockholders who would be materially injured, said stockholders as such have [fol. 138] not had a fair opportunity and the conclusive presumption fails.

We may assume that this statement of the trial court determining that the provisions of the statute are unconstitutional is as strong and convincing a statement as has anywhere been made in any of the briefs and as could be made by counsel, and therefore we may conclude that if we do not agree with the reasons given by the court in arriving at his conclusion that we may safely discard them and likewise discard the conclusion based upon his statement of the law.

It might be well to point out that the judges of the court below have disagreed upon the question of the constitutionality of this act. On rehearing the motion of the plaintiff to strike from the files the intervening petition of Bertha K. Krauss, which motion was sustained, the court took occasion to say:

"The failure to comply with the statute results in certain consequences as fixed by the statute. It is not unconstitutional as suggested by counsel as the opportunity for the company to protect itself is amply provided for.

The failure to take advantage of the statutory provision may result unfortunately for either stockholders, but the remedy would be an action against those directors who were derelict in their duty."

The Statute

While certain provisions of Section 8623-72 have been heretofore quoted it might be well to highlight other provisions in order that we may better understand the purpose sought to be accomplished by the Legislature.

We do this not with any pretense that the analysis here made is technically accurate. Certain words and phrases will be underscored as they seem to us to particularly bear upon the proper solution.

In the first place, it will be observed that the section of the statute is within the chapter titled IX "Private Corporations" which constitutes the general corporations act. The section under special examination falls under the subheading "Consolidation", although specifically relating to the rights of dissenting stockholders, and in general it provides: Any dissenting stockholder who shall not have voted in favor of certain proposals when substantially all of the property of the corporation has been authorized to be sold, or in case of reorganization, "shall be paid the fair cash value of his shares as of the day before the vote was taken authorizing any such action", if the stockholder within twenty days after the vote shall object in writing to the action and shall demand in writing the payment of such fair cash value of his shares. Such payment shall be made within thirty days after the value is agreed upon or deter- [fol. 139] mined. The right of a dissenting stockholder to be paid the fair cash value shall cease when the corporation shall abandon the purpose or the authority shall be revoked. Within ten days after the receipt of the demand the corporation shall inform the shareholder whether it will pay the demanded amount and if it refuses to pay such amount it shall offer in writing to pay an amount as and for such fair cash value. If the corporation shall not agree to pay the amount demanded or the dissenting shareholder shall not agree to accept the amount offered, the corporation or the dissenting shareholder, if he has complied with all conditions, may, within six months after the day the vote was taken, but not thereafter, petition the Court of Common Pleas to determine the fair cash value of the shares mentioned in the demand as of the day before the vote was taken. Then follows the disputed provision:

"If such petition is not filed within such period the fair cash value of the shares shall conclusively be deemed to be

equal to the amount offered to the dissenting shareholder by the corporation, if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

Then follows the provision as to the contents of the petition and the procedure to be followed in ascertaining the fair cash value of the shares on the day before the vote was taken, such value to be ascertained by appraisers whom the court shall instruct respecting their duties. The appraisers shall proceed to determine the cash value and report to the court, which report shall be considered on such evidence as the court may consider relevant and if said award shall be found to be reasonable and shall be approved, judgment shall be rendered against the corporation for the payment of the amount. If the appraisers shall fail to make an award within ten days or the award shall not be confirmed by the court, it shall summarily determine the fair cash value and render judgment. Such proceedings shall be deemed to be special proceedings.

Then follows a statement of the rights of the dissenting stockholders under the conditions recited in the statute.

As has heretofore been pointed out all the essential provisions of the statute have heretofore been declared constitutional except the single provision which is designated in the brief as No. 7, being the last quoted portion of the statute. General observation as to the intent of the statute is to facilitate either the consolidation of the corporation or the sale of its assets and protect the rights of the minority stockholders who have not joined in the action of the majority either in reference to the sale of assets or consolida-
[fol. 140] tion. It will be observed that the action is summary in its nature, having in view the benefits that may accrue to all parties by a speedy determination of their rights. It will be observed further that ample machinery is provided for the fixing of the fair cash value of the stock of the dissenting stockholders with appropriate means of ascertaining this value and proper judicial process.

The sole complaint seems to be lodged against the provision that if after the dissenting stockholder has made the demand for the payment of what he alleges to be the fair cash value, and the corporation has made no counter offer

and neither the corporation nor the dissenting stockholder has within the period of six months petitioned the court to determine the fair cash value, the fair cash value "shall conclusively be deemed an amount equal to that demanded by the dissenting stockholder." It will be observed that the corporation after receiving the demand shall inform the shareholder whether it will pay and if it refuses to pay it shall offer in writing to pay an amount as and for the fair cash value. If no petition is filed the fair cash value shall conclusively *to* deemed to be equal, first, to the amount offered to the dissenting stockholders by the corporation, if any such offer shall have been made, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder. It will thus be seen that an opportunity is given to the corporation to refuse to pay the amount demanded in which event it shall offer in writing to pay another amount. If the corporation has made such an offer and no petition is filed the fair cash value shall be that offered to the dissenting stockholder even though it may be less than the demanded amount. It is only in the event that the corporation has made no counter offer that the demand of the dissenting stock-holder conclusively is deemed to be the fair cash value. We fail to see how either the dissenting stockholder or the corporation is denied due process of law. Our procedure is replete with provisions which determine the rights of parties who have failed to follow the procedure provided by the statute whereby they may have their rights legally determined and such transactions repeatedly come before the courts. If an action is brought for the payment of money only and the defendant is informed of the amount claimed and does not answer within the time specified, judgment may be taken against him and unless for good cause that judgment is opened up to permit him to answer, the amount thereof is final. If a motion for a new trial is not filed within three days the [fol. 141] matter is finally determined against the party failing to file and so it may be said that there are short periods provided by the statute in which appeals may be perfected, rules that must be followed. If the party fails to follow these the judgment of the court is final. In the statute in question machinery is provided by which the whole controversy may be legally determined, and if those in interest fail to avail themselves of this machinery the

consequences provided by the statute follow as a matter of course.

We should not lose sight of the fact that the statute deals with corporation property. It is still the property of the corporation and the final distribution to the stockholder is dependent on the procedure which is incident to the sale, consolidation or distribution of the property of the corporation. Corporations are creatures of the statute and under the Constitution the Legislature has reserved rights which permit it to alter the laws controlling corporations.

Complaint of the Consenting Stockholders

The consenting stockholders complain that an undue value is given to the stock of the dissenting stockholder by virtue of the provision that the fair cash value of the shares of the dissenting stockholder shall conclusively be deemed to be equal to that demanded by such dissenters by reason of which fact the consenting stockholder suffers by diminution of the amount remaining to be paid to him; which may be considerably less than that demanded by the and under the statute paid to the dissenting stockholder. We have already pointed out that there is ample machinery to protect all the stockholders. However, the complaint is made that the machinery testing the fair cash value asserted by the dissenting stockholders may not be put in operation by any other than the corporation through its offers, or the dissenting stockholders, and therefore if the corporation fails to make a counter offer and permits a period to elapse, that the property of the assenting stockholder is appropriated without due process of law. Aside from the fact that the Board of Directors represent stockholders, and conceding that such Board of Directors have ulterior motives and that with intent to favor the dissenting stockholders has failed to have the corporation avail itself of the machinery to contest the dissenting stockholders' valuation of his stick, yet we are of the opinion that if the consenting stockholder has any reason to believe that the corporation will not protect his interests he may, within the six months [fol. 142] limit, intervene on his own behalf. In the instant case it will be observed that one stockholder, to wit, Bertha K. Krauss, did file an intervening petition which on motion was stricken from the files. However, it will be further observed that she filed this intervening petition on April 10, 1937, and that the six months period had expired on

December 2nd, 1936, and the fair cash value had then become fixed as the amount demanded by the dissenting stockholder. The consenting stockholders further assert that they were not parties to the procedure and have no means of knowing what would be the outcome if the dissenting stockholder secured as a fair cash value the amount of his claim. They certainly were stockholders. They had participated in the procedure and they should have kept themselved advised as to what might be the effect of the action or failure to act of the corporation upon the amount ultimately to be distributed to them. However, we may further explore the question as to whether or not they had as consenting stockholders the right to intervene within the six months period.

The case of Geiger v. The American Seeding Machine Co., 124 O. S., 22, wherein the court was interpreting the provisions of the statutes as it stood prior to the Amendment now incorporated in the statute and especially in the section now under examination is of importance. The court there held:

"Where a corporation is making a distribution of corporate assets among preferred and common stockholders and questions or priority arise between the two classes it is not error to permit the individual stockholders to become parties and to plead their claims and to prosecute error proceedings as such independently of the corporation."

It will be first observed that there were two classes of stockholders here under examination, preferred and common, who were entitled to become parties and to plead their claims. In the present case it is asserted that there are not two classes of stock, all being stockholders, and that therefore the holding in that case does not apply. We think this claim is without merit because, while all stock is designated as common stock, yet by virtue of the statute, upon the dissenting of the holders of certain of the common stock, there is at once a demarkation between the stock held by the dissenting stockholder and that held by the consenting stockholder, by virtue of the fact that the dissenting stockholder may have his fair cash value fixed while the consenting stockholder must take what is left after the payment to the dissenting stockholder, and he therefore is as much interested in the controversy as if he were the holder of a different class of stock and has the same right to be-

come a party and to plead his claim as if he was the holder of a different class of stock. Judge Marshall in passing [fol. 143] upon this case states at page 231:

"1. It is true that as a general proposition the corporation through its officers controlled the corporation action but there are nevertheless two sufficient reasons why the stockholders should be permitted to act for themselves; First, the corporation had already announced its intention to abide by the decision of the court on August 2, 1930, and not to prosecute error therefrom. Second, the stockholders were the real parties in interest. The contract of sale made by the corporation had been legally ratified by the action of the stockholders and it could make no difference to the corporation as such entity whether the distribution of the proceeds of the sale to stockholders was on one basis or another. The contract of sale is not challenged. This was purely a controversy between the two classes of stockholders. * * * The position of the corporation was that of a stakeholder or trusteeship and the real contentants were the respective classes of stockholders."

It is urged by the consenting stockholders that one of the reasons asserted in the Geiger case why the stockholders should be permitted to intervene was that the corporation has announced its intention to abide by the decision of the Court and not to prosecute error, and that in the instant case there was no declaration upon the part of the corporation that it did not intend to contest the fair cash value of the stock, but even so the second reason given by Judge Marshall is amply sufficient to give the consenting stockholders a right to intervene to protect their interests. Besides the failure to contest was not different from the first reason given in the Geiger case.

As before stated this statute then under review has since been amended to its present form. Judge Marshall states, on page 239:

"Whether the amendment's effective July 1st, 1929 is valid as not impairing the obligation of a contract we have neither considered nor decided. That question is not before the court at this time."

It is held in the Geiger case that the section now under consideration provides an exclusive remedy for dissenting stockholders. But in the later case of Johnson, Appellant,

v. Lamprecht, Appellees, 133 O. S., 567, relating to the same statute as now in force, it is held that the remedies provided by this section are not exclusive. If fraud or illegality are found in the adoption of an amendment of articles, changing the express terms of the provision of outstanding shares, the court holding,

"If fraud or illegality is found in the enacting of the amendment, the remedy under that section (8623-72) is not exclusive."

We think these two decisions can be readily reconciled to the effect that the scheme for the consolidation and sale of corporate assets is exclusive but that during the course of [fol. 144] the procedure any stockholder may intervene for the protection of his rights.

As heretofore pointed out the court below was very definite in the reason why he held the act unconstitutional, stating,

"It is a familiar law that one of the constitutional requisites of due process is a hearing or opportunity to be heard before a competent tribunal."

He concludes,

"Here the corporation as such has a 'fair opportunity' but since the board of directors failed to act, and such failure could not legally have been prevented by the stockholders who would be materially injured by such failure, such stockholders *as such* have not had such 'fair opportunity' and so in the court's opinion the conclusive presumption fails and with it the cases of plaintiffs."

We arrive at the conclusion that the consenting stockholders had a right to intervene to have their interests determined and that therefore a holding as to "the fair cash value" of the stock owned by the dissenting stockholders was not an appropriation of the property of the consenting stockholder without due process of law. The contrary view being the basis upon which the court below entered his judgment, it follows the judgment below should be reversed and cause remanded.

Hornbeck, P. J. concurs.

Barnes, J., dissents.

Appearances:

Carrington T. Marshall, O. R. Crawfis, Attorneys for Plaintiffs-Appellants.

Arnold, Wright, Purpus & Harlor, Attorneys for Defendants-appellee.

[fol. 145] BARNES, J., dissents:

It is with regret that I find myself unable to agree with the majority in the determination of this cause.

It is my conclusion that the judgment of the trial court should be affirmed, for the same reasons as set out in the written opinion of the lower court. In my judgment the provision of paragraph 7 of Section 8623-72, G. C., as it applies to the instant case, is nothing short of a statute of confiscation and manifestly in violation of constitutional rights.

The various steps taken by the corporation were in furtherance of liquidation. This is evidenced from the first part of Section 8623-72 as to what shall be done when all or substantially all of the property or assets of the corporation have been authorized to be sold. Before the institution of the present action the corporation had surrendered its charter. I do not mean to say that the dissenting stockholders should not have the right to have determined in a court of law the value of their stock as provided in paragraph 6 of the above section; but I can not agree with the confiscatory provisions of paragraph 7, whereby a dissenting stockholder's filing his objections and fixing the value of his stock shall be conclusive as to value.

The fact that the corporation itself might obviate this result by filing a counterproposition and fixing value or/and bringing action to have value determined is not sufficient.

When the liquidation has proceeded thus far, it can not be said that the board of directors represent the majority stockholders any more than they represent the minority stockholders. The right of the stockholders on liquidation to a full distributive share of the assets, should not be defeated by any failure of the board of directors to initiate proceedings through which the value of the dissenting stockholders' shares would be determined in a court action.

I fully agree that stockholders had they been advised of the situation, could have initiated or compelled action through which value would have been determined. I am unable to conclude that the majority stockholders or the dis-

senting stockholders other than the six who brought action are under the law required to anticipate that action would not be brought to determine value. They certainly are not estopped for the reason that estoppel would only arise when they have knowledge of such facts as would require action. The predicate for the stockholders' injecting themselves into a corporate activity is when knowledge is brought home to them that the officers of the corporation are not properly [fol. 146] functioning. This was the situation in the case of Geiger v. Seeding Machiner Company, 124 O. S., 222-231.

"It is true that as a general proposition the corporation through its officers and directors controlled corporate action, but there are nevertheless two sufficient reasons why the stockholders should be permitted to act for themselves; First, the corporation had already announced its intention to abdie by the decision of the court on August 2, 1930, and not to prosecute error therefrom. Second, the stockholders were the real parties in interest. The contract of sale made by the corporation had been legally ratified, * * * and it could make no difference to the corporation, as such entity, whether the distribution of the proceeds of the sale to stockholders was on one basis or another."

Furthermore, it is quite a different proposition to say that under certain situations stockholders may take action or be permitted to be made parties in a legal proceeding, and that they were required under all conditions to bring action or have themselves made parties.

Again referring to the facts in the instant case, there is nothing in the record through which it may be assumed that the majority stockholder, dissenting stockholders other than the six bringing action, and the officers of the corporation had any knowledge that the six stockholders were taking steps to have the value of their stock determined. Furthermore, there is no provision of the section that requires notice to be given to the stockholders that such claims had been filed.

To permit the six dissenting stockholders to recover on the basis of 100% par value of their stock, is confiscatory and is taking from other stockholders what is justly theirs without due process of law. In my judgment paragraph 7 of the section is unconstitutional..

[fol. 147] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 3001

OLGA E. VOELLER, ET AL., Plaintiffs-Appellants,

v.

THE NEILSTON WAREHOUSE COMPANY, ET AL., Defendants-Appellees

Decision Rendered on the 2nd Day of June, 1939.

By the Court:

An application is made for rehearing for the reason set forth in the accompanying brief. Both the appellants and appellees filed briefs. We have carefully gone over the matter presented and given it our close consideration and have also re-examined the opinion formerly rendered herein. The brief supporting the application for rehearing seems to us to be rather more technical and captious in its presentation of the matter than the occasion calls for. Counsel should appreciate how the opinion was written, partly by Judge Barnes, and partly by the majority members of the Court. This was frankly stated and of necessity there may be some inconsistencies between the statement by Judge Barnes and that made by the other members of the Court, but they are, in our judgment or no consequence, as one reading the opinion as an entirety could not fail to appreciate what was the question presented and decided. Counsel for defendants-appellees have leveled some criticism at the opinion for the reason that the opinion has used the words "intervene" and "procedure" as though they were necessarily used as applicable to a party intervening in a pending court action. To intervene in one's own behalf has a broader meaning than that and all that was attempted to be said was that the assenting stockholders had a right to protect their own interests in the distribution of the assets of the corporation under the statutes involved. Whether or not such action of the corporation was a "procedure" or "proceeding" is of little consequence. It was the method prescribed by the statute by which the interests of the various stockholders could be determined and a stockholder, whether assenting or dissenting, had an interest in the mat-

ter and had a right to protect that interest which no court would deny if proper application were made. We do not agree that the assenting stockholders were required to wait six months before presenting whatever complaint they may have had, to the court under the statute, or to properly pro-
[fol. 148] tect their interests. To what varied activities the word "proceeding" may be accurately attached will appear from the following cases: State, ex rel. Kaiser v. Babst, 101 O. S., 275; State, ex rel. Toledo v. Weiler, 113 O. S., 443; State, ex rel. Johnson v. Chandler, 105 O. S., 499; Industrial Commission v. Vail, 110 O. S., 304; State, ex rel. Lutz, 42 O. App., 345. Many other illustrations may be found as to what is a "proceeding" in citations under Section 26 G. C. If the word "proceeding" could be properly used to designate the various activities touched upon in these decisions, it is certainly proper to use it or the word "procedure" in connection with the well defined statutory process through which a corporation may distribute its assets to stockholders.

We have been unable to detect in applicant's brief or reply brief any reason why we should depart from our former opinions.

Application denied.

Hornbeck, P. J., Geiger and Barnes, J. J., concur.

Appearances:

Arnold, Wright, Purpus & Harlor, Krumm & Schwenker, Attorneys for Defendants-Appellees.

C. T. Marshall and O. R. Crawfis, Attorneys for Plaintiffs-Appellants.

[fol. 149] CERTIFICATE

STATE OF OHIO,
Franklin County, ss:

I, J. Arthur Yoder, Clerk of the Court of Appeals of Franklin County, Ohio, do certify that the foregoing is a true copy of the decisions rendered in the above cause by said court of Appeals on the 9th day of May, 1939, and on the 2nd day of June, 1939, as appears by the original decisions on file in the office of said Clerk of Courts.

Witness my hand and the seal of said Clerk of Courts this 20th day of May, A. D. 1940.

J. Arthur Yoder. (Seal.)

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[fol. 150] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Carrington T. Marshall. File No. 44,442. Ohio, Supreme Court, Term No. 97. Olga E. Voeller, Dorothy Gloeckner, Nellie B. Pugh, et al., Petitioners, vs. The Neilston Warehouse Company and The Ohio National Bank of Columbus. Petition for a writ of certiorari and exhibit thereto. Filed May 23, 1940. Term No. 97 O. T. 1940.

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FILE COPY

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FILED
MAY 23 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

No. [redacted] 97

OCTOBER TERM, 1939.

OLGA E. VOELLER, DOROTHY GLOECKNER, NELLIE B. PUGH, BUTLER C. BOND, ANTOINETTE KESSLER AND MAYE B. WILLIAMS,

Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY AND THE OHIO NATIONAL BANK OF COLUMBUS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CARRINGTON T. MARSHALL,
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44 E. Broad St., Columbus, Ohio,
Attorneys for Petitioners.

RODENFELS LAW PRINTING COMPANY, Columbus, Ohio.

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IN THE

Supreme Court of the United States.

No. .....

OCTOBER TERM, 1939.

OLGA E. VOELLER, ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

STATEMENT.

To the Honorable, The Supreme Court of the United States:

Your petitioners, Olga E. Voeller, et al., respectfully pray for a writ of certiorari to be addressed to the Supreme Court of Ohio, the court in which the record herein is now lodged under provisions of Section 237 (b) and 240 (a) of the Judicial Code as amended under the Act of February 13, 1925, and Rules of Practice and Procedure.

This controversy was first filed in the state court January 14, 1937.

It involved the constitutionality of an Ohio statute as measured by the Fourteenth Federal Amendment.

The statute was attacked in the answer in the trial court.

The trial court in its entry declared the statute to be unconstitutional.

The Ohio Court of Appeals in its journal entry reversed the trial court and upheld the statute.

The Supreme Court of Ohio reversed the Court of Appeals and in its opinion declared that the statute is unconstitutional.

The decision of the Ohio Supreme Court was rendered March 27, 1940.

The amount involved is $25,280.00.

This cause originated as an action at law by petition filed January 14, 1937, in the Court of Common Pleas of Franklin county, Ohio, and was heard by the court without the intervention of a jury, the jury being by stipulation waived in that court.

The petitioners, other than Olga E. Voeller, brought similar suits in the Court of Common Pleas of Franklin county, Ohio, upon similar causes of action and by agreement of counsel for all parties and with the consent of the trial court, all of said causes were consolidated with the cause instituted by the petitioner Olga E. Voeller and have since proceeded in the Court of Appeals of Franklin county, Ohio, and in the Supreme Court of Ohio on successive appeals as a consolidated cause.

The petitioner, Olga E. Voeller, sought to recover the sum of $4,000.00 with interest at 6% from June 26, 1936, and the other petitioners sought to recover other amounts, which causes amounted in the aggregate to $25,280.00 with interest from June 26, 1936.

The actions in the trial court arose out of the following circumstances:

On and prior to 1936, the respondent, The Neilston Warehouse Company, was a corporation organized under Ohio laws. In 1936 that corporation was a going concern operating a warehouse at a profit and also paying small dividends and was making monthly payments upon the principal of its mortgage indebtedness at the rate of $500.00 per month.

The directors of that corporation suddenly decided that they wanted to sell the warehouse and in April of 1936 entertained a proposal on behalf of The Creasy Corporation for the purchase of the warehouse and thereupon the directors submitted that proposal to the shareholders and unanimously recommended its acceptance.

This submission was in conformity with the provisions of Section 8623-65 of the General Code of Ohio (112 Ohio Laws, 35, Section 65), a copy of which statute is as follows:

> "A corporation may, by action taken at any meeting of its board of directors, sell, lease, exchange or otherwise dispose of all or substantially all of its property and assets, including its good will, upon such terms and conditions and for such considerations, which may be money, shares, bonds, or other instruments for the payment of money or other property or considerations, and, if desired, may divide or distribute such considerations among its shareholders on such terms and basis and in such manner as its board of directors deems expedient, when and as authorized by the vote of holders of shares entitling them to exercise at least two-thirds of the voting power on such proposal, or the vote of such other proportion, not less than a majority, or vote by classes, as the articles may require, at a shareholders' meeting called for that purpose. Notice of such meeting shall be given to all of the shareholders of record of the corporation whether or not they shall be entitled to vote thereat.
>
> "Nothing in this section is intended to restrict the power of any corporation, without the authorization

thereof by the shareholders, to sell, lease, exchange, or otherwise dispose of, any of its property if thereby the corporate business be not substantially limited, or if the proceeds of such property be appropriated to the conduct or development of its remaining business.

"Dissenting shareholders, whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided." (Boldface ours.)

That statute which is similar to the statutes of many of the states of the Union governing the sale of all or substantially all of the assets of a corporation, provides that such a sale can be made "when and as authorized by the vote of holders of shares entitling them to exercise at least two-thirds of the voting power on such proposal * * * at a shareholders' meeting called for that purpose."

The proposal was to sell real estate, which was carried on the books of the company at a valuation of $353,499.74 (Transcript, page 102), for the sum of $171,560.00 (Transcript, page 74).

At the meeting of the shareholders the proposal failed to receive a favorable vote of two-thirds of the shares; thereupon in the following month another proposal to purchase the real estate was received from the same prospective purchaser, The Creasey Corporation of Louisville, Kentucky, offering $196,950.00 (Transcript, page 49). The directors again recommended this proposal and called another meeting of stockholders. There were 5,078 shares of stock issued and outstanding and 4,783 were represented at the meeting; 3,591 shares voted for the proposal and 1,125 voted contra. The directors therefore had the authority to make the sale. Section 8623-65 contained the following final paragraph:

"Dissenting shareholders whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided."

By that final paragraph, Section 8623-72 was made a part of subsection 65. Section 8623-72 (114 Ohio Laws, 66) in its pertinent provisions, is as follows:

"Unless the articles otherwise provide, any dissenting shareholder, who shall not have voted in favor of the proposals herein mentioned and by the provision of any section of this act, is entitled to relief when the articles of the corporation have been amended, or when all or substantially all of the property and assets of the corporation have been authorized to be sold, leased, exchanged, or otherwise disposed of, or when a consolidation or reorganization of the corporation has been authorized, shall be paid the fair cash value of his shares as of the day before the vote was taken authorizing any such action, excluding from such fair cash value any appreciation or depreciation in consequence of the consolidation or other matter which entitled him to such relief, if such shareholder within twenty days after the day on which the vote was taken, shall object in writing to the action so taken and shall demand in writing the payment of such fair cash value of his shares. Such payment shall be made within thirty days after such fair cash value is agreed upon or determined. If a person is the holder of more than one class of shares he shall be entitled to relief only in respect of the class of shares in respect of which relief is provided by this act.

"Any such objection and demand for the payment of fair cash value of shares shall state the number and kind of shares held by the dissenting shareholder making the demand, and the amount which such shareholder claims is such fair cash value.

"The right of a dissenting shareholder to be paid the fair cash value of his shares shall cease if and when the corporation for any reason shall abandon its purpose or the shareholders shall revoke the authority to sell, lease, exchange, or otherwise dispose of its assets, consolidate, reorganize or amend its articles.

"No demand for payment of such fair cash value may be withdrawn by the shareholder making the same unless the corporation, by its board of directors, shall consent to such withdrawal (or unless the right of such

dissenting shareholder to be paid the fair cash value of his shares has ceased.

"Within ten days after the receipt of such demand the corporation shall inform such shareholder in writing whether it will pay the demanded amount, and, if it refuses to pay such amount, it shall offer in writing to pay an amount as and for such fair cash value.

"If the corporation shall not agree to pay the amount demanded, or the dissenting shareholders shall not agree to accept the amount offered by the corporation, the corporation or the dissenting shareholder, if he has complied with all the conditions of this section, may, within six months thereafter, petition the Court of Common Pleas of the county in which such corporation or the consolidated corporation has its principal office to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken to which objection was made as aforesaid.

"If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided." (Boldface ours.)

* * * * * * * * * *

"A shareholder who so objects in writing and demands in writing payment of the fair cash value of any shares shall not be entitled to vote such shares or to exercise any rights respecting such shares or to receive any dividends or distributions thereon, unless and until the sale, lease, exchange, other disposition, consolidation, reorganization or amendment shall, for any reason, be abandoned, or, with the consent of the corporation, the objection and demand shall be withdrawn; provided that if, prior to such abandonment, withdrawal or the consummation of such corporate transaction, dividends shall be paid in money to shareholders of the same class as those dissenting and who are of record on or after the day on which the vote was taken authorizing such corporate transaction, then and at such times an amount of money equal to the dividends

otherwise payable upon such dissenting shares shall be paid to the holders of record thereof who would, except for such dissent, be entitled to receive such dividends, and each such payment shall be a credit upon the total amount to be paid for such shares by or on behalf of the corporation. If the corporation shall, prior to such abandonment, withdrawal or the consummation of such corporate transaction, make distribution of anything other than money on a class of shares as to any of which such a dissent has been made, such distribution shall be computed as though such dissenting shares were included in the total outstanding shares of such class entitled to participate therein. All the holders of such dissenting shares of record at the time of any such abandonment, and any holder of record so withdrawing said objection and demand, shall thereupon be restored to the status of a shareholder; and any of such payment theretofore made on such shares shall be deemed to have been dividends thereon. If, prior to any such abandonment or withdrawal, distributions other than of money have been made upon such class of shares then, in the event of abandonment, all of the then holders of record of dissenting shares, and, in the event of any such withdrawal, the then holder of record of such dissenting shares so withdrawing such objection and demand, shall receive such distributions as though the rights of such dissenting shares had not been suspended.

"Any shareholder who does not object and demand in writing the payment of the fair cash value of his shares, in the manner and at the time hereinbefore provided, shall be concluded by the vote of assenting shareholders.

"A corporation may rescind any vote authorizing the sale, lease, exchange or other disposition of its assets, consolidation, reorganization or amendment, abandon its purpose, and revoke authority conferred by any vote at any time before the action so authorized has been completed, by the same vote as was required to authorize such action."

Subsection 72 provides in substance that any dissenting shareholders "shall be paid the fair cash value of his shares as of the day before the vote was taken authorizing any such action, excluding from such fair cash value any appreciation or depreciation in consequence of the consolidation or other matter which entitled to him such relief, if such shareholder within twenty days after the day the vote was taken, shall object in writing to the action so taken and shall demand in writing the payment of such fair cash value of his shares."

Thereupon, and within twenty days, these petitioners as dissenting shareholders, owning in the aggregate 288 shares, filed written objections and demands. These objections and demands were made to the corporation itself.

At this point another provision of subsection 72 became applicable:

> "Within ten days after the receipt of any such demand, the corporation shall inform such shareholder in writing whether it will pay the demanded amount, and, if it refuses to pay such amount, **it shall offer in writing to pay an amount as and for such fair cash value.**" (Boldface ours.)

Acting within that ten-day period the corporation directed a letter to each of the demanding stockholders under date of June 26, 1936, as follows:

> "Your demand for payment is refused. The purpose for which The Neilston Warehouse Company was incorporated has been abandoned.
>
> "The Neilston Warehouse Company,
> "By G. W. Bobb, President."

(Transcript, page 85.)

It will thus be seen that the corporation did not see fit to make a counter offer.

This brings us to the sixth paragraph of Section 72, which provides:

> "If the corporation shall not agree to pay the amount demanded, or the dissenting shareholders shall not agree to accept the amount offered by the corporation, the corporation or the dissenting shareholder, if he has complied with all the conditions of this section, may, within six months after the date on which the vote was taken but not thereafter, petition the Court of Common Pleas of the county in which such corporation or the consolidated corporation has its principle office to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken to which objection was made as aforesaid."

It will thus be seen that either the corporation or the dissenting shareholder might have brought an action within the six months period to determine the fair cash value, but the fact is that neither the corporation nor the dissenting shareholder brought such an action within that period.

Thereupon, another provision of Section 72 became applicable, which will be hereinafter referred to as the seventh unnumbered paragraph of the section and which paragraph becomes the crux of this controversy. That paragraph reads as follows:

> "If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenter by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

There has never been in any of the courts through which this litigation has proceeded any question or doubt as to the meaning of that paragraph, and it has never been doubted that if that paragraph is a constitutional provi-

sion that these petitioners had a right to recover the respective amounts for which they sued. That is to say, the petitioners herein as dissenting shareholders having made their demands of definite sums of money as the fair cash value of their stock, and those demands having been refused by the corporation without at the same time offering "in writing to pay an amount as and for such fair cash value," the result of the failure of the corporation to offer "an amount" or to bring an action within six months was to make it obligatory upon the corporation to pay the full amounts demanded by the dissenting shareholders who brought suits therefor.

The petitions filed by the plaintiffs in the Common Pleas Court and who are now the petitioners in this proceeding alleged in their petitions the operative facts as hereinbefore stated. (Transcript, page 1.)

The amended answer filed by the corporation did not traverse any of those operative facts. **The fifth defense of that answer pleaded the constitutionality of the statute as being violative of the due process clause, to wit, Section 1 of the Fourteenth Amendment.** (Transcript, page 6.)

Replies were filed by these petitioners, but those replies only completed the legal issue of constitutionality or unconstitutionality of the seventh unnumbered paragraph and raised the further issue of estoppel. (Transcript, page 11.)

THE CONSTITUTIONAL QUESTION INVOLVED.

The sole question decided by each of the courts of the state of Ohio and the sole question which will be presented to the Supreme Court of the United States relates to the constitutionality of that seventh unnumbered paragraph, and whether by the provisions of that paragraph the majority stockholders had a fair opportunity to controvert the demands of the dissenters in the amounts demanded by them.

In the trial of this cause in the Common Pleas Court and inferentially in the Supreme Court it was decided that the corporation itself had not been denied due process, but it was further decided that the majority stockholders by reason of not having been named in the statute and by reason of not having been expressly given certain undefined powers as stockholders that the seventh paragraph was unconstitutional as to them, on the ground that the majority stockholders as such were being denied due process.

The issue of the separate individual rights of the majority shareholders as such was first clearly drawn by an intervening petition filed by one of the majority shareholders on her own behalf and also on behalf of all other shareholders similarly situated which was filed on April 10, 1937, sometime after the filing of the original answer by the corporation, which answer was filed on the twentieth day of March, 1937. This intervening petition will be found in the transcript filed herewith. (Transcript, page 93.)

The intervening petition was filed by the same counsel who have represented the corporation throughout these proceedings. It raised the same constitutional defenses as were contained in the amended answer filed by the corporation. The prayer of the intervening petitioner was that "her rights and the rights of all other shareholders in The Neilston Warehouse Company, similarly situated, be protected."

To this intervening petition a motion was filed by counsel for Mrs. Voeller, on the ground "that said intervening petition sets up no defense not available to the defendant, The Neilston Warehouse Company."

This motion was sustained and thereupon an application for rehearing was filed and Judge Dana Reynolds upon

the application for rehearing rendered the following opinion (Transcript, page 100):

"On rehearing the motion of plaintiff to strike from the files the intervening petition of Bertha K. Krause is sustained.

"Leave to file the intervening petition was granted in an ex parte hearing without notice to plaintiff, and unless relevant, and material to the issues in the case, it has no place in the case.

"The action here is between the plaintiff, a stockholder in defendant company, and that company, to recover the claimed value of her stock after sale of the company's entire assets.

"The statute gives specific directions as to procedure both by the stockholders and by the directors of the company, if the latter considered the valuation placed by the stockholder on her stock to be in excess of its real value.

"Their failure to comply with the statute resulted in certain consequence as fixed by the statute.

"It is not unconstitutional as suggested by counsel, as the opportunity for the company to protect itself is amply provided for." (Boldface ours.)

"The failure to take advantage of the statutory provision may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty.

"The issues raised by the plaintiff is whether or not plaintiff has complied with the provisions of the statute.

"On this issue the intervening petition is irrelevant.

"Reynolds, J.

"Dated September 30, 1937."

Following that opinion, entry was placed upon the journal of the court as follows (Transcript, page 101):

"Entry.

(Filed February 17, 1938.)

"This day this cause came on to be heard upon the motion of the plaintiff to strike the intervening peti-

tion of Bertha K. Krauss from the files and to dismiss her as a party herein, and the court being fully advised in the premises finds that said motion is well taken and should be sustained. The court also finds that the motion for rehearing filed on behalf of said intervenor is not well taken and should be overruled.

"It is accordingly ordered, adjudged and decreed that said motion of the plaintiff be sustained and that said motion for rehearing of the intervenor should be overruled, and the intervening petition of the said Bertha K. Krauss is ordered stricken from the files and she is dismissed as a party herein, to which finding and order of the court said intervenor excepts."

We call special attention to the opinion of Judge Reynolds wherein as early as September 30, 1937, he declared that the statute was constitutional and that the company had ample opportunity to protect itself and that the remedy of the majority stockholders, if any, was "against those directors who were derelict in their duty."

The intervening petition of the majority stockholders was therefore dismissed, which was a final order as to them and they did not appeal from that final order.

We fully appreciate the rules and precedents which only permit us to argue the constitutional question in this court and yet we think the intervention of the majority stockholders in the original action, their dismissal and their failure to appeal becomes a significant element in the case. It is further an indication that opposing counsel then believed, as they should still believe, that the majority stockholders could have intervened before the expiration of the six months period and that they had a **fair opportunity** to protect whatever rights they desired to assert during that six months' period by compelling the directors and officers of the corporation to make a counter offer within ten days or to bring an action to determine

the value which would in turn have repelled any presumption as to the fair value of the stock under the provisions of said seventh unnumbered paragraph.

Notwithstanding this decisive action on the part of Judge Reynolds in disposing of the intervening petitioners, when the case came on for trial on its merits before Judge Charles Leach, he disregarded the former action of Judge Reynolds and made a contrary ruling on behalf of the majority stockholders and entered judgment against the dissenting stockholders. In so doing he declared that the statute was constitutional as to the corporation itself, and that while the statute was not objectionable on its face, it was unconstitutional because of its effect in operation, further declaring that the "stockholders **as such** have not had such fair opportunity."

On appeal to the Court of Appeals, the court on May 9, 1939, by a divided court reversed the Court of Common Pleas, holding that the "Common Pleas Court erred in finding that General Code Section 8623-72 as to the seventh unnumbered paragraph thereof, was unconstitutional as being in violation of the due process clause of the Constitution of the United States."

We quote the concluding paragraph of Judge Geiger who wrote the majority opinion in the Court of Appeals, as follows:

> "We arrive at the conclusion that the consenting stockholders had a right to intervene to have their interests determined and that therefore a holding as to 'the fair cash value' of the stock owned by the dissenting stockholders **was not an appropriation of the property of the consenting stockholders without due process of law.** The contrary view being the basis upon which the court below entered his judgment it follows the judgment below should be reversed and cause remanded. (Boldface ours.)
>
> Hornbeck, P. J., concurs.
>
> Barnes, J., dissents."

On May 19, 1939, an application for rehearing was filed by the corporation. In its decision rendered June 2, 1939, denying such application the Court of Appeals, by the concurrence of all judges thereof, said:

> "Counsel for defendants-appellees have leveled some criticism at the opinion for the reason that the opinion has used the words **'intervene'** and **'procedure'** as though they were necessarily used as applicable to a party intervening in a pending court action. To intervene in one's own behalf has a broader meaning than that and all that was attempted to be said was that the assenting stockholders had a right to protect their own interests in the distribution of the assets of the corporation under the statutes involved. Whether or not such action of the corporation was a 'procedure' or 'proceeding' is of little consequence. It was the method prescribed by the statute by which the interests of the various stockholders could be determined and a stockholder, whether assenting or dissenting, had an interest in the matter and had a right to protect that interest which no court would deny if proper application were made. We do not agree that the assenting stockholders were required to wait six months before presenting whatever complaint they may have had, to the court under the statute, or to properly protect their interests."

The journal entry of the Court of Appeals will be found in the transcript filed herein. (Transcript, page 90.)

On appeal to the Supreme Court of Ohio, that court by its decision rendered on the twenty-seventh day of March, 1940, agreed with Judge Leach who heard the case on its merits in the Common Pleas Court and disagreed with Judge Reynolds, who had declared the law to be constitutional; it likewise disagreed with the majority of the Court of Appeals and rendered the following judgment as declared in the syllabus:

> (1) "The constitutionality of a law may be determined by its operative effect."

(2) "A statute, the operative effect of which is to deprive a person of his property without notice and without opportunity to be heard before a competent tribunal, is violative of Section 1 of the Fourteenth Amendment of the Federal Constitution."

(3) "That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process of the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation." (Transcript, page 103.)

We do not take issue with the first and second paragraphs of the syllabus, but merely call attention to that phrase of the second paragraph "without notice and without opportunity to be heard." It is of course our contention that the seventh unnumbered paragraph of Section 8623-72 was reciprocal in its operation and that by reason of its provisions the dissenting stockholders would have been bound by any offer made by the corporation, if the dissenting stockholders had failed to bring an action within six months. Inasmuch as the corporation failed to make any offer within the ten-day period, the corporation became bound to pay the demands of the dissenting stockholders by reason of not having brought a similar action within six months.

The constitutional question was determined twice in the Common Pleas Court and twice in the Court of Appeals, once on a judgment of reversal and later on a rehearing, and the constitutional question was again decided in the Supreme Court. In each of these instances, the constitutional determination appears not only in the issues but in the judgment as well.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Supreme Court of Ohio has erred where a federal constitutional question is involved, and where the United States Supreme Court has not heretofore determined the question, and has declared principles not in accord with applicable federal decisions.

Leavenworth Co. v. Chicago, R. I. & P. Ry. Co., 18 Fed., 209;
Beechwood Securities Corporation, Inc., v. Associated Oil Co. et al., 104 Fed. (2d), 537.

These cases are commented upon at pages 35 and 36 of the appended brief.

(2) It is the judgment of the Ohio Supreme Court that the statute is unconstitutional because it does not expressly provide for notice to the majority shareholders and expressly give the majority shareholders certain undefined powers in relation to such a transaction. The necessary effect of the decision is:

(a) That redress to dissenting shareholders can only be obtained by the dissenting shareholders notifying the majority shareholders of their demands.

(b) Even though the answer of the corporation and the intervening pleading of the majority stockholders make no allegation concerning lack of notice or knowledge and even though the dissenting shareholders recorded their vote in the open meeting in the presence of the majority shareholders, it leaves the dissenting shareholders without redress and the majority shareholders are not even put upon inquiry.

(c) That when the vote is taken in the open meeting the proceeding is entirely ended so far as the majority shareholders are concerned—any action taken or to be taken thereafter by the dissenting shareholders is the beginning of a new proceeding so far removed from the former proceeding that notice and knowledge must be served by the dissenting shareholders upon the majority shareholders.

(d) The necessity of notice to and knowledge of the majority shareholders is so imperative and the rights of the majority shareholders are so paramount that the dissenting shareholders are without remedy, unless it is alleged and proven that the dissenting shareholders gave notice of their demands to each majority shareholder. This burden rests upon the hapless dissenter, as a condition precedent to their obtaining redress.

(e) Inasmuch as the directors must necessarily be owners of stock, and in this present case it so happens that they were the owners of approximately one-third of all the stock, the directors are as majority shareholders in the full benefit of the lack of knowledge on the part of certain majority shareholders.

(3) It was the opinion of the Ohio Supreme Court that Section 8623-72 providing relief for dissenting shareholders is separate and distinct and covers a different subject from Section 8623-65. This view is obviously unsound. Section 8623-65 would obviously be unconstitutional except for the relief provided in Section 8623-72. The latter is an essential supplement of the former.

This feature of the case must be considered in connection with the further erroneous view that the majority shareholders are denied due process. Furthermore, we must keep in mind that after the majority have imposed

their will upon the minority by authorizing the sale, it properly becomes a matter of negotiation to determine the rights of dissenting shareholders and the amount to be paid to them for their stock.

To illustrate the difficulties created by the Ohio decision, it is only necessary to refer to such large corporations as The A. T. & T. Company, the U. S. Steel Company, General Motors Corporation, and Proctor and Gamble Company. In more than one of these corporations, the number of stockholders runs into the tens of thousands. If any one of those corporations would want to amend its articles or to effect a merger with another corporation and a two-thirds majority should decide to amend or merge, under the Ohio decision the dissenting shareholders would be without remedy unless all the majority shareholders should be individually notified of the demands of the dissenters. In such event, it may be wondered, under the principles declared by the Ohio Supreme Court, whether the majority shareholders would be compelled to act as a body or with unanimity or by majority of the majority, or what percentage of the entire number should act in order to make the statute valid.

Referring to the matter of negotiation with dissenting shareholders in an effort to reach an agreement as to the fair cash value, if the corporation may not act for the majority what proportion of either the dissenters or the majority shareholders would be required to concur in order to render this statute constitutional. Surely, the impracticability of such a situation conclusively shows that no such provision could be made or if it were made that it would be practical in operation.

(4) Other states of the Union have provisions in their statutes relative to the sale of entire assets of a corporation

similar to the seventh unnumbered paragraph of Section 8623-72, and if this decision of the Ohio Supreme Court is permitted to stand unchallenged and unreversed, that decision will be cited in the courts of those states where similar controversies occur. If the decision of the Ohio Supreme Court is sound, it should be so declared by the Supreme Court of the United States, and thereby become a precedent to be followed by the courts of other states. In that event, the Legislature of those states and the Legislature of the state of Ohio may make proper amendments to their statutes and render them constitutional. If the decision is unsound, the Supreme Court of the United States as the final arbiter of questions of violation of the federal Constitution should so declare, to the end that the legislation in Ohio and other states may remain unimpaired.

(5) The denial of this petition for certiorari would give added force to the decision of the Ohio Supreme Court, assuming its unsoundness, because the fact of the denial of certiorari would be referred to in any future controversies in the state of Ohio or in other states having similar statutes, and this fact makes it important that there be a final determination of the principles involved in this controversy by the United States Supreme Court.

(6) We call attention to certain declarations of principles found in the majority opinion of the Ohio Supreme Court, which we think are erroneous general statements of law and are particularly erroneous as declared in controversies between corporations and dissenting stockholders in proceedings for a sale of entire assets. We quote the following examples (see Transcript, page 103):

> (a) "The pecuniary and personal interest of two opposing groups of stockholders are primarily involved in a situation like the present one—the majority who

vote for the sale of the corporate property and the minority who did not so vote."

(b) "Majority stockholders are left entirely out of the equation."

(c) "Directors are in no sense personal representatives of the stockholders by whose sufferance they hold office."

(d) "A stockholder and the corporation of which he is a member are separate and distinct persons in law and their interests are always distinct and some times adverse."

(e) "A stockholder of a corporation is not chargeable with actual knowledge of its business affairs or of notices imparted to it."

(f) "The voting and later conduct of the minority were separate and distinct matters."

(7) The Ohio Supreme Court decision violates the well-settled principle of the common law of Ohio and we think of every state in the Union that where directors are unfaithful to their trust or exceed their corporate powers or are negligent in the discharge of their duties, any stockholder who conceives himself to be aggrieved, may bring an action in the name of the corporation to protect corporate rights and incidentally, stockholders' rights. This will be amplified in our supporting brief.

(8) By the simple expedient of making a counter offer within ten days after the dissenting stockholders have made their demands, the situation would have been completely reversed in such event, if the dissenting shareholders had failed to bring an action within six months, they would have been compelled to accept any offer so made.

(9) It will be conceded that any statute which in terms creates a conclusive presumption where there is no fair opportunity to avoid or repel the presumption would be unconstitutional, and this principle has been so declared

in more than one decision of the United States Supreme Court, as will be hereinafter discussed in our supporting brief.

On the other hand the United States Supreme Court decisions are quite consistent in construing statutes to be constitutional which in terms create a conclusive presumption, but which in fact afford a fair opportunity to avoid or repel the presumption.

(10) This statute is in the nature of a statute of limitations, or more accurately stated, it is a jurisdictional limitation upon the right to bring an action to question the amount demanded as fair cash value after expiration of the six months' period.

(11) We are, of course, not asking this court to consider and decide any question other than a federal question, nevertheless, we point out that as a precedent to be decided in future litigation in Ohio and in litigation in other states, the Ohio opinion should not stand unchallenged because of its erroneous conclusions in several particulars involving matters of local law.

(a) The majority stockholders filed an intervening petition in the Common Pleas Court and upon motion being filed to dismiss the intervening petitioners. The motion was sustained and they were dismissed from the case. This was a final order and an adjudication that they had no rights which were separate and distinct from the rights of the corporation itself, and the dissenting stockholders did not appeal from that final order. The Ohio Supreme Court held that by such determination, res judicata did not apply to the majority stockholders. (See opinion, page 112 of the Transcript.) We think this was an erroneous decision upon the question of res judicata. A reversal of the Supreme Court of Ohio would avoid this feature of the case as a precedent.

(b) It was argued by these petitioners in the Supreme Court of Ohio and the argument was sustained in the dissenting opinion of Judge Hart:

> "That the defendants, having invoked the powers created by Section 8623-65, General Code, to bring about a sale of the corporate property, are, under authority of New York Central Rd. Co. v. City of Bucyrus, 126 Ohio St., 558, 186 N. E., 450, now estopped to question the constitutionality of that part of Section 8623-72, General Code, which creates a conclusive presumption in favor of minority shareholders." (See dissenting opinion, Transcript, page 113.)

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio, commanding that court to certify, and to send to this court for review and determination, on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 27724, Olga E. Voeller, Dorothy Gloeckner, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler and Maye B. Williams, plaintiffs-appellees, v. The Neilston Warehouse Company and The Ohio National Bank of Columbus, defendants-appellants; and that said judgment of the said Supreme Court of Ohio may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Olga E. Voeller, Dorothy Glocker, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler, and Maye B. Williams,

By CARRINGTON T. MARSHALL,

ORLAND R. CRAWFIS,

Attorneys for Petitioners.

BRIEF.

CONSTITUTIONAL QUESTION INVOLVED.

We will again state the issue involved in the state courts and which therefore becomes the issue in this review. That there may be no mistake about this, we quote from the opening statement of the brief of opposing counsel in the Ohio Supreme Court:

> "Only the **individual rights** of shareholders are involved. The sole question is as to the constitutionality of the seventh (unnumbered) paragraph of Section 8623-72, General Code. More precisely stated, it is whether or not the **conclusive presumption** provided in the statute violates the **due process** clause of the Fourteenth Amendment of the Constitution of the United States."

Section 8623-72 is supplementary to Section 8623-65 and both sections are set forth at pages 3 to 5 of this petition.

Section 8623-65 is a restraint upon an Ohio corporation and the officers and directors to prevent them from making a sale of all or substantially all assets, but nevertheless permits such sale to be made if a two-thirds majority of all shareholders entitled to vote approve the sale. Section 8623-65 is for the sole benefit of the majority and permits the majority to make such sale however disastrous the sale may be to the interest of the corporation and more particularly to the dissenting minority. How arbitrary and dictatorial the majority may be is well illustrated in the instant case. A corporation paying regular dividends and making substantial payments each month upon the principal of mortgage indebtedness, engaged in the warehousing business, ordered the warehouse sold to gratify the selfish purposes of the majority at a price which was only

fifty-five percent of its book value and less than fifty percent of its real value.

Granting such authority to the majority shareholders would have been a denial of due process in the absence of some provision for the protection of the dissenting shareholders. Instead of making provision for the protection of the dissenting shareholder in the body of Section 8623-65, the last paragraph of that section contained the following:

> "Dissenting shareholders, whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided."

The further provision referred to is Section 8623-72. The constitutionality of both sections, when taken together, has never been doubted either as to the corporation or as to the majority or the dissenting shareholders. If the provisions of Section 8623-72 had been followed by The Neilston Warehouse Company, this controversy would never have arisen.

The first step required to be taken by a dissenting shareholder is that provided in the first unnumbered paragraph of Section 72 requiring him within twenty days to object in writing to the action of the majority and to demand in writing the payment of the fair cash value of his shares. The second unnumbered paragraph requires that such demand shall state the amount demanded. The third unnumbered paragraph permits either the corporation or the majority shareholders upon receipt of such demand to abandon the purpose to sell.

If there is no abandonment, then the fifth unnumbered paragraph requires the corporation within ten days after receipt of the demand to inform the shareholders, in writing, whether it will pay the demanded amount and, in the

event of refusal, to make a counter offer in writing "of an amount as and for such fair cash value."

If the corporation fails to comply with the fifth paragraph, they still have ample opportunity to protect majority shareholders because it is provided in the sixth paragraph that the corporation may begin an action within six months in the Court of Common Pleas of the county to determine the fair cash value. It will thus be seen that the corporation had three separate and distinct opportunities to avoid the payment of an unfair demand:

(1) To abandon the purpose to sell, and the majority shareholders were expressly given the right to revoke the authority to sell.

(2) To make a counter offer within ten days.

(3) To bring an action within six months.

This brings us to the seventh unnumbered paragraph which becomes the crux of the controversy. Neither the corporation nor the majority shareholders nor the dissenting shareholders having brought an action within six months, the situation was controlled by the seventh paragraph which has been quoted in boldface at page 6 of this petition.

The dissenting shareholders having faithfully complied with the statute in all its particulars and the corporation and the majority shareholders having failed to abandon the purpose to sell and the corporation having failed to make a counter offer and the corporation having failed to bring a suit and the majority shareholders having failed to bring an action in the name of the corporation within six months to determine the fair cash value, the statute permits the dissenting shareholders to recover the amounts demanded by them.

This controversy involves no element of interpretation. It has never been questioned by any of the courts of Ohio or by any judge thereof in this controversy that the seventh paragraph is constitutional in so far as it applies to the corporation itself. The only question is as to whether the majority shareholders have individual rights **as such** which are not protected.

OHIO COURTS HAVE HELD SECTION 8623-72 TO BE CONSTITUTIONAL.

The seventh paragraph of that section has not been in effect many years and no court has heretofore been called upon to pass upon the validity of that segregated paragraph. In fact it is difficult to imagine that any other case would ever arise where the corporation or the majority stockholders would defiantly refuse to comply with the provisions for making an offer of a definite amount or to bring an action within six months to determine fair cash value and then expect the courts to relieve from such defiant and flagrant omission. Apparently, the instant case is the first example of any such omission and it will probably be the last.

While no court has passed upon that particular paragraph, two courts in Ohio have made general declarations of the constitutional validity of Section 8623-72. One of these cases is **Williams v. National Pump Corp.**, 46 Ohio Appeals, 427, 188 N. E., 756. In that case, it was the dissenting stockholder who was claiming unconstitutionality but, of course, if it is constitutional as to the dissenting stockholders, it must be constitutional as to the majority stockholders and to the corporation itself.

Another unreported case is **Miller v. Canton Motor Coach**, decided by the Court of Appeals of the Fifth District, December 30, 1937. Again the issue was raised by the dissenting stockholder. We quote from that opinion as follows:

> "The appellant contends, first, that Section 8623-72, General Code, was not a valid enactment by the Legislature, and, in any event, is unconstitutional. Its counsel suggests that the trial court disposed of these contentions with a wave of the hand. Frankly, we are disposed to do much the same thing. **We see nothing at all in the contention that this section, as enacted and in the form in which it was printed, is invalid, or is anything other than a properly enacted statute of the General Assembly of Ohio.**
>
> "We note, incidentally, that the constitutionality of this section, as well as Sections 8623-14 and 8623-15, was upheld by the Court of Appeals of the Second District in the case of Williams v. The National Pump Corporation, 46 Ohio Appeals, 427, on pages 432 and 433. In his opinion that court says:
>
> " 'These sections should be read into the certificates and form a part thereof.' "

Motion to certify denied. No debatable constitutional question. 133 O. S., 384.

STATUTE SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF MINORITY SHAREHOLDERS.

In 87 A. L. R., 598, under annotations with reference to "Construction and effect of provisions for payment of dissenting stockholders in statutes relating to merger," etc., and under the sub-heading "Strict or Liberal Construction" it is stated:

> "The courts have taken the view that statutes of the kind under consideration, providing for the appraisement and payment of the value of the stock of

dissenting stockholders upon the consolidation with another company, should be liberally construed in favor of such stockholder."

The same authority, at page 603, in a further discussion of the principle of liberality in construction **in favor of the minority or dissenting shareholders** and in commenting on Manning v. Brandon Corp (1931), 163 S. C., 178, 161 S. E., 405, states:

"It was said that the statute, which gave the consolidating corporation one of the highest rights known to the law, viz., that of taking the property of the stockholder over his objections, did not intend that the consolidation should take place without the payment to the stockholder of the value of his stock and all costs and attorney fees which he had incurred in the proceeding; and that the statute should be construed liberally in favor of the stockholder, so as to carry out the manifest theory of the act ,and to save harmless the stockholder from all costs and expenses."

As said in New Jersey & H. R. R. Co. v. American Electrical Works (1911), N. J. L., 391, 81 Atl., 989:

"The scheme of the act is to provide a simple and prompt remedy for what otherwise might be a serious injustice to the minority stockholders. The majority in interest in availing themselves of the privilege conferred by the act to make a consolidation of the companies, agree in advance to make compensation to the dissenters."

And on the matter of liberal construction in favor of the minority stockholders we are not without precedent in Ohio, because in **Miller v. Canton Motor Coach**, supra, the Court of Appeals, Fifth District, in approving Manning v. Brandon Corp., supra, quoted the following:

" 'This statute should be construed liberally in favor of the stockholders, so as to carry out the manifest theory of the act.' "

This judgment was appealed to the Ohio Supreme Court on motion to certify and the motion was at first sustained but later the motion to certify and a petition in error was dismissed upon the ground that no debatable constitutional question is involved. 133 O. S., 284; 14 N E. (2d), 15.

THE MAJORITY SHAREHOLDERS OR ANY ONE OF THEM COULD HAVE ACTED IN THE NAME OF THE CORPORATION.

Referring to the trial court's opinion, we find the following language:

> "Reference to the section involved, as above stated, shows that the plaintiffs might have petitioned the court to have had determined a fair cash value of their shares; **the corporation could have done likewise.** (Boldface ours.) But (and this, as the court views the situation is the crux of the matter) could the other stockholders so have petitioned the court, or taken any other action to safeguard their present interests in this regard."

The trial court then, in disposing of the case in favor of the defendant, proceeded to answer its own question in the negative and thus ignored the Hornbook Law which clearly and unequivocally gives the majority shareholders, or any one of them, the right to act for the corporation and to thus safeguard their own and the corporation's rights.

In meeting that issue, the Supreme Court of Ohio in its opinion takes the utterly indefensible position that the majority shareholders, outside of the directors, were not shown to have had knowledge of the demands of the dissenting shareholders or that those demands had been refused without a counter offer having been made. It must be said in passing that there was no issue of lack of knowledge made in the pleadings. The claim of lack of knowl-

edge first appears in the briefs of opposing counsel in the Court of Appeals. It would seem that if lack of knowledge on the part of the majority shareholders is an element in the case, the burden would be on those shareholders to have alleged in an answer that they had no such knowledge. The answer filed by the corporation makes no such allegation and even the intervening petition which was filed by the majority shareholders and which was later dismissed contained no charge of lack of knowledge. (Transcript, page 6.)

We quote from page 433 of the majority opinion the Supreme Court:

> "But assuming, for the purposes of this discussion, that the majority stockholders did have notice or were chargeable with notice of the minority demands, could they have acted in the assertion of their individual rights and, if so, were they obliged to act? It seems to us that the question requires a negative answer. In the first place, the controlling statute does not provide for action on the part of the majority; negotiations and resort to judicial proceedings are limited to the corporation and the minority stockholders who have asserted themselves." (Transcript, page 109.)

The court cited no authorities in support of this astounding proposition. No authorities could be cited.

We will not at this time discuss the text writers or the adjudicated cases in Ohio which clearly settle the proposition that stockholders do have the right to act in the name of the corporation in the event of the failure of the corporation to act in their behalf but we will merely cite a few of the Ohio authorities which so hold. We do not attempt to cite the hundreds of cases decided by other jurisdictions which declare a similar doctrine and it is

unnecessary to say that not a single jurisdiction has ever held the contrary.

Dodge v. Woolsey, 18 Howard, 331, 15 L. Ed., 401;
Zinn v. Baxter, 65 O. S., 341;
Wasmer v. Massillon Iron Works, 7 O. App., 488; motion to certify overruled;
Truman v. Machinery Co., 11 O. App., 220;
Koblitz v. Brookside Co., 20 C. C. (N. S.), 67;
Baldwin v. Hillsboro Co., 10 W. L. J., 337;
Geiger v. American Seeding Machine Co., 124 O. S., 222;
Henry v. Jeanes, 47 O. S., 116, 48 O. S., 443.

A leading case on this principle and one of the earliest is Dodge v. Woolsey, 18 Howard, 331, which was appealed to the U. S. Supreme Court from the Ohio Circuit Court wherein it was held that stockholders might enjoin the directors from doing acts in violation of the charter.

See also Fletcher Cyc., Corp. Perm. Ed., Section 5939 et seq.; 10 Oh. Jur., Section 244 et seq.

NOTICE OF DEMANDS TO CORPORATION IS NOTICE TO THE MAJORITY SHAREHOLDERS.

This was virtually so declared by Judge Reynolds in dismissing the majority shareholders from the case.

It was again substantially so stated by Judge Geiger in his opinion.

It was definitely so declared by the Court of Appeals of Erie county in the case of **Commercial Banking and Trust Company v. Tenants Realty Company**, 37 O. App., 566. We quote the following headnotes

"(2) Directors of corporation occupy fiduciary relations toward stockholders.

"(3) Directors of corporations as trustees of stockholders must act in interest of stockholders and protect their rights in good faith."

We do not concede, in view of the elementary law governing corporations and the management thereof, that the majority shareholders were entitled to any notice other than a notice of the meeting called for considering the proposed action. Nor do we concede that it is incumbent upon the plaintiff to prove that the majority shareholders did receive any such specific notice, even if they were entitled to it.

Moreover, if the majority shareholders were entitled to such specific notice of the demands, surely it would be incumbent upon them to set up the want of such notice, as a defense, which has not been done in this case.

But let us examine at this time the facts and the law. That all shareholders are charged with knowledge of the law need not be repeated here. Nor need we repeat that under no section of the Corporation Act could the corporation make a sale of substantially all of its property and assets except under Sections 8623-65 and 8623-72. As said in **Geiger v. Seeding Mch. Co.**, 124 O. S., at page 236,

> "the contract of sale is governed by Sections 8623-65 and 8623-72."

In fact by the express terms of 8623-65 it is admonished that no such sale can be made except

> "When and as authorized by the vote of holders of shares entitling them to exercise at least 2/3 of the voting power on such proposal * * *. Notice of such meeting shall be given to all of the shareholders of record of the corporation whether or not they shall be entitled to vote thereat."

Now it is alleged by the petition and admitted by the answer that following the resolution of the board of directors such a meeting of the shareholders was called for and held on June 2, 1936 (and it is asserted in appellants'

brief, page 5, "The shareholders were notified of this proposal and a special meeting was held on June 2, 1936"), and at that meeting there were present either in person or by proxy 4,785 shares out of a total of 5,078.

General Code 8623-65 provides in part that

> "Dissenting shareholders * * * **shall be** entitled to **relief in the manner and under the conditions** hereinafter provided."

When the meeting was held on June 2, 1936, every shareholder was charged with knowledge of the foregoing provision of the Ohio Law under which the corporation proposed to make the sale.

The only section covering the rights of dissenting shareholders, outside of Section 65 itself, which so expressly provides that they **shall be** entitled to relief, is Section 8623-72 which sets forth in detail how they shall be protected. A preliminary step to secure such relief to which they **shall be entitled** is that the dissenting shareholders "who shall not have voted in favor of the proposals" shall within 20 days after the meeting "object in writing to the action so taken and shall demand in writing the payment of the fair cash value of his shares."

We point out that when dissenting shareholders appear at a duly called special meeting **of which every shareholder had due notice,** and vote against the proposal, that is sufficient notice to the majority shareholders that the dissenting shareholders are proceeding to obtain the "relief in the manner and under the conditions" set forth in that statute. We do not conceive how by any stretch of the imagination it could be held that the majority shareholders are entitled to separate individual notices of the demands. We have dwelt upon this question because appellants have emphasized the claim that "the majority

shareholders had no notice of the demands of the dissenters."

Perhaps we should have disposed of this question of knowledge of "majority shareholders" by pointing out that, having had due notice of the proceedings instituted by the corporation, they are charged with knowledge, that they constituted the corporation, that they controlled it, that they voted for the sale, and otherwise participated in the procedure, that they are bound by all the consequences of their acts, and by the corporate acts. As said in **New Jersey & H. R. R. Co. v. American Elec. Works**, 82 N. J. L., 91, 81 Atl., 989:

> "The majority in interest in availing themselves of the privilege conferred by the act * * * agree in advance to make compensation to the dissenters."

Leavenworth Co. v. Chicago, R. I. & P. Ry. Co., 18 Fed., 209, was a case growing out of the consolidation of two railroads and involved a suit by a stockholder to set aside a sale by one company to the other upon the ground that the stockholder had no notice. This case was decided by a United States Circuit Court before the organization of the Court of Appeals. It was decided by two judges. The justly famous John F. Dillon was of counsel in that case which is assurance that the research in that case was thorough and that the propositions of law were exhaustively presented.

We quote from page 211 of the opini n:

> "On the contrary, the court would be inclined to hold that the stockholders of the respective corporations are charged with notice of the proceedings, and bound to proceed with reasonable diligence to annul them."

And again at the same page:

> "It is said, however, that the complainant may have had notice of the fact of consolidation, but not of the facts rendering the consolidation fraudulent. No doubt the question in all such cases must be, not whether complainant had knowledge of the act complained of, but whether he knew, or might, by proper diligence, have known, of the facts constituting the fraud."

And again at page 212:

> "• • • Can the defendant be heard to plead its ignorance of the powers of the corporation of which it was a member? We think it was bound to know what those powers were; and if it were not, it would be held bound, in such a case as this, to make inquiry within a reasonable time after the act complained of, and would be held to such knowledge as it might acquire by such inquiry."

To the same effect, but stated in in a different form, is the holding of the court in the case of Beechwood Securities Corporation, Inc., v. Associated Oil Co., et al., 104 Fed. (2d), 537. The fifth paragraph of the syllabus of that case is as follows:

> "No fraud warranting setting aside of a consolidation of corporations is committed on shareholder in corporation when he receives treatment which the statute advised him was his due when he invested in shares in the corporation."

The effect of the language of the above decision is that notice to the corporation is notice to the shareholder, and that the shareholder is entitled to no further notice. In other words, when the shareholder invests in the stock of the corporation, he submits himself to the management of the corporation and becomes bound by the acts of the officers of the corporation, so long as the officers act within

their powers. Or stated in another way, the statute advised him of his due, and his rights cannot rise higher than the rights of the corporation itself.

We conclude our argument upon this point by quoting from the majority opinion in the Court of Appeals:

> "The consenting stockholders further assert that they were not parties to the procedure and have no means of knowing what would be the outcome if the dissenting stockholder secured as a fair cash value the amount of his claim. They certainly were stockholders. **They had participated in the procedure** and they should have kept themselves advised as to what might be the effect of the action or failure to act of the corporation upon the amount ultimately to be distributed to them."

The action taken by the majority shareholders on June 2, 1936, authorizing the corporation to sell substantially all its property, was the very fountain head of plaintiff's right of action—**and of that meeting and of the action then taken the majority shareholders did have notice.**

ESTOPPEL BY ACCEPTING BENEFITS.

It is a well settled principle of law that a party who invokes the provisions of a statute for his own purposes and obtains relief under that statute to the disadvantage of another party will not thereafter be heard to complain of the validity of the statute which he has invoked or, as the court puts it, he will not be able to assail and rely upon a statute in the same proceeding. The following U. S. Supreme Court cases establish this principle:

Pierce Oil Co. v. Phoenix Refining Co., 259 U. S., 125, 66 L. Ed., 855;

Hirsch v. Block, 267 Fed., 614 (Writ of certiorari denied, 254 U. S., 240);

Grand Rapids, Etc., R. R. Co. v. Osborn, 193 U. S., 17, 48 L. Ed., 598.

All of the foregoing cases on the subject of estoppel by accepting benefits are cases decided by the Supreme Court of the United States. That court is, of course, the fountain head and final authority of principles governing due process as guaranteed by the Fourteenth Federal Amendment and yet the courts throughout the Union have been in perfect harmony with the Supreme Court cases on this subject..

It is unnecessary to discuss the above or the decisions of other states and we will content ourselves with citing a single case decided by the Supreme Court of Ohio:

New York Central R. R. Co. v. Bucyrus, 126 O. S., 558, 186 N. E., 450. This case involved an Ohio statute which was limited in its application to villages having a population of 3066. In the fourth syllabus, the court declared the statute to be unconstitutional because it was a statute of a general nature which would not have uniform operation throughout the state. The statute was further held invalid because it authorized the village to make donations to private corporations. Having declared the statute to be unconstitutional, the Supreme Court of Ohio nevertheless declared that a party claiming constitutional invalidity while having received, and still holding, the fruits of an agreement made under the statute is estopped from questioning the constitutionality of the law or the proceedings of the village.

Applying that decision to the instant case, the corporation and the majority stockholders having invoked the provisions of Section 65, which section refers to and makes 72 a part thereof, will not be permitted to claim the unconstitutionality of any part of Section 72.

IS THIS A CONTROVERSY BETWEEN STOCKHOLDERS?

Judge Reynolds in the Common Pleas Court by his decision dismissing the intervening petitioners, in effect, held that the majority stockholders were bound by the corporate actions of the directors and officers. (Page 12 of this petition.)

Judge Leach of the Common Pleas Court, on final hearing, took a different view and declared that while the statute was valid as against the corporation, it was unconstitutional as against the majority stockholders.

The majority opinion of the Court of Appeals in reversing Judge Leach first epitomized his decision in the following language:

> "The majority of the stockholders had no statutory right to act personally by way of filing a petition to have determined the cash value of the plaintiff's shares; they were at the mercy of the directors whose actions they could not control or direct."

Commenting upon this declaration, the Court of Appeals answered it as follows:

> "We have already pointed out that there is ample machinery to protect all the stockholders. However, the complaint is made that the machinery testing the fair cash value asserted by the dissenting stockholders may not be put in operation by any other than the corporation through its officers, or the dissenting stockholders, and therefore if the corporation fails to make a counter offer and permits a period to elapse, that the property of the assenting stockholder is appropriated without due process of law. Aside from the fact that the board of directors represent stockholders, and conceding that such board of directors have ulterior motives and that with intent to favor the dissenting

stockholders has failed to have the corporation avail itself of the machinery to contest the dissenting stockholder's valuation of his stock, yet we are of the opinion that if the consenting stockholder has any reason to believe that the corporation will not protect his interests he may, within the six months' limit, intervene on his own behalf. In the instant case it will be observed that one stockholder, to wit, Bertha K. Krauss, did file an intervening petition which on motion was stricken from the files. However, it will be further observed that she filed this intervening petition on April 10, 1937, and that the six months' period had expired on December 2, 1936, and the fair cash value had then become fixed as the amount demanded by the dissenting stockholder. The consenting stockholders further assert that they were not parties to the procedure and have no means of knowing what would be the outcome if the dissenting stockholder secured as a fair cash value the amount of his claim. They certainly were stockholders. **They had participated in the procedure, and they should have kept themselves advised** as to what might be the effect of the action or failure to act of the corporation upon the amount ultimately to be distributed to them." (Boldface ours.)

The opinion of the Ohio Supreme Court on this point at page 433 of the report of that case states:

"By voting for the sale of the corporate property, the majority stockholders were not thereby chargeable with notice of the demands of the minority, affecting the individual interests of the former in the distribution of funds, which demands were subsequently transmitted to the coproration. The voting and the later conduct of the minority were separate and distinct matters. Geiger v. American Seeding Machine Co., 124 Ohio St., 222, 177 N. E., 594, 79 A. L. R., 614." (Transcript, page 109.)

It should be observed that Judge Geiger who wrote the majority opinion in the Court of Appeals in the instant case was the plaintiff in the case cited and it is significant that Judge Geiger also discussed that case in the course

of his opinion in the instant case taking an entirely different view of that authority.

We again quote from the Supreme Court opinion:

> "Putting it a little differently, 'a stockholder and the corporation of which he is a member, are separate and distinct persons in law, and their interests are always distinct and sometimes adverse.' Lawson & Covode v. Farmer's Bank of Salem, 1 Ohio St., 206, 211." (Transcript, page 108.)

Again, an Ohio case was cited. It should be observed however that Lawson v. Farmer's Bank, 1 O. S., 206, only decided that the interest of a stockholder of a corporation under the Ohio Code of evidence would not disqualify the witness but that it only affected the weight of his evidence. As an authority in the instant case as affecting the relation of the stockholder to the corporation, it is without any value whatever.

The effect of the above quotation is to deny that directors of an Ohio corporation are the representatives of the stockholders in corporate affairs which pronouncement flies in the face of the Ohio statutes on that subject. We therefore quote Section 8623-55:

> "All the capacity of a corporation shall be vested in and all its authority, except as otherwise provided in this act or in the articles in regard to action required to be taken, authorized or approved by shareholders, shall be exercised by a board of directors, of not less than three persons, which shall manage and conduct the business of the corporation." (112 Ohio Laws, page 35, Section 55.)

Even if the pronouncement of the Supreme Court of Ohio is a correct general statement of the relation between officers and stockholders, surely it cannot be a correct statement as applied to Section 8623-65 and Section 8623-72. The corporation having invoked the statute and the ma-

jority stockholders having prevailed and having imposed their will upon the dissenting shareholders, and the conditions imposed upon the minority shareholders having been complied with, the majority stockholders should not be heard to complain that the corporation ceases to be their representative after the vote is taken.

Judge Hart, who wrote a dissenting opinion, briefly stated that inasmuch as the defendants had "invoked the powers created by Section 8623-65, General Code, to bring about a sale of corporate property" they are estopped to question the constitutionality of Section 8623-72. (Transcript, page 113.) The logic of his brief dissenting opinion should have led him to declare that inasmuch as the statute is reciprocal that both the majority and the minority are estopped to question the constitutionality and that therefore the statute is "constitutional in operation."

We think the dissenting opinion of Judge Myers, who declared the statute to be constitutional on all points, has summed up this feature of the case with logic that is unanswerable.

> "When the majority stockholders voted upon the question of the sale of the property of the corporation they were charged with notice of the provisions of the statute. They set in operation the statute here involved. In doing so, they take the statute not only with its benefits but also with its infirmities, if any there be. It is not unlike the first step of a contract. Especially so since under Section 8623-72, General Code, a dissenting stockholder may not, without consent of the corporation, withdraw his demand for payment 'of such fair cash value,' once it is made. If in the light of later events he has demanded too little, he is bound by the procedure even as is the majority. In the instant case a procedure was outlined by the board of directors which the majority stockholders could authorize or not as they saw fit. If the majority stockholders are of the opinion that the procedure is in-

equitable they have only themselves to blame if they set the machinery in motion. One may not voluntarily initiate a procedure outlined in a statute and thereafter ask to be relieved from the effects of its operation on the claim of the statute's invalidity. Here the dissenting stockholders were not responsible for the situation in which the majority found themselves. Furthermore, the property having been sold, the majority are not in a position to place the dissenting stockholders in statu quo." (Transcript, page 114.)

DUE PROCESS.

The trial court and the Supreme in Ohio have declared the statute to be a violation of due process, "because of its effect in operation."

Keeping in mind that the statutory provision is reciprocal, and that the presumption only prevails against that party who fails to comply with its conditions, and that either party has equal and ample opportunity to comply, the "effect in operation" is fallacious reasoning.

The dissenting shareholders have been compelled to yield to the majority, and Section 8623-72 is their guaranty of due process. They have faithfully complied with the conditions of a statute designedly adverse to their interests. Surely, it is not a denial of due process to an arrogant majority, when the officers of the corporation who are their accredited representatives defiantly refuse to make a counter offer.

The seventh paragraph of Section 8623-72 uses the words "conclusively presumed" but we think that language does not mean that the real value of the property is fixed by the failure to make an offer or to bring the suit. The real meaning is that by reason of failure to comply with the conditions precedent, the corporation will not thereafter be heard to bring the value into question. In other

words, it is in the nature of a condition to the exercise of a right, or more accurately speaking, a condition precedent.

The Ohio statute comes clearly within the principles declared in Orient Insurance Co. v. Daggs, 172 U. S., 557, 43 L. Ed., 552. In that case, a statute of Missouri was under attack. The statute provided that in suits brought upon policies of fire insurance, the insurance company will not be permitted to deny that the property insured was worth less than the amount of insurance covered by the policy. The language of the statute in that case is "the defendant shall not be permitted to deny, etc." The real meaning of the seventh paragraph of Section 8623-72 is that unless the corporation offers an amount within the ten-day period or, failing in that, brings a suit within the six months period to determine fair cash value, that the company

> "Shall not be permitted to deny that the stock was worth the amount demanded by the minority stockholders."

Further referring to the Missouri statute, we find the following provisions:

> "And in the case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured."

Paraphrasing that language into Section 8623-72, the Legislature might have said:

> "In case of failure to offer an amount or to invoke judicial process to determine fair cash value, the measure of damages shall be the amount demanded by the minority stockholders."

The foregoing case is cited as the leading case because it contains the declaration of the Supreme Court of the

United States. It should be stated, however, that Ohio has a similar statute, 9583, General Code, which states:

> "In the absence of any change increasing the risk without the consent of the insurers and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium shall be paid."

Although this statute has been in effect since 1879, no one has ever questioned the validity of that provision.

The Supreme Court of Ohio has declared that the full amount of the policy can be recovered and not in a single case has the constitutionality of the statute been questioned.

Insurance Co. v. Leslie, 37 O. S., 409.

The foregoing cases present a pertinent analogy to the instant case. Insurance companies are held to a fulfillment of a contract. The analogy is that the relation between stockholders of a corporation and the corporation itself is contractual. Every stockholder is "conclusively deemed" to know the law and when he makes his stock subscription, he agrees to be bound by Section 8623-55, General Code, which confers upon the directors all corporate powers.

Furthermore, the majority stockholders meet and authorize the sale of the entire assets at a price wholly unsatisfactory to the minority shareholders, they acquire the advantage given by Section 8623-65 imposing their will upon the minority and by the same token become bound by the last paragraph of that section which entitles dissenting shareholders to the relief provided in Section 8623-72. This obligation upon the dissenting shareholders to submit to the will of the majority and also the obliga-

tion of the majority to give relief to the minority is contractual, the statutes being read into the relations between them and also being read into the proceedings. The majority opinion of the Supreme Court of Ohio is entirely silent upon this point and the dissenting opinion of Judge Myers takes full cognizance thereof.

Returning to the question of due process and again concurring with opposing counsel that due process only requires that parties shall have a fair opportunity to resort to judicial process, let us further consider the practical application of those principles.

The guaranty of due process certainly does not mean that any party may deliberately ignore all statutory provisions for his protection and knowingly, stubbornly and defiantly proceed in disregard of all safeguards provided for his protection and then when he finds himself at a disadvantage or inconvenience, claim the protection of the guaranty of due process.

The trial court in its opinion in declaring that the seventh paragraph of Section 8623-72 violates due process, cited only the case of **Manley v. Georgia**, 279 U. S., 3. That case involved a criminal statute which was particularly drastic because the presumptions therein created against the officers of a bank which had failed in business was such as to not only put upon the officers the burden of proving their innocence but it even made it practically impossible for them to prove their innocence by reason of the sweeping character of the presumptions. Even so, Mr. Justice Butler stated in the opinion at page 6 that it was only necessary that a defendant have "a fair opportunity" to repel the presumption.

While the seventh paragraph under discussion does use the word "conclusively," that term only becomes applicable

when the corporation defiantly disregards the provisions which are made in the fifth and sixth paragraphs which afford the corporation and the majority stockholders full safeguards.

The Court of Appeals in its opinion declares the case of Manley v. Georgia not to be sufficiently pertinent to be commented upon and makes the same statement of many other cases which were cited in the brief of opposing counsel in that court.

In this connection, we desire to cite other cases of the Supreme Court of the United States which have held that a statute which in terms creates a conclusive presumption is constitutional if there has been "a fair opportunity" to repel it.

Western and Atlantic Railway v. Henderson, 279 U. S., 639, 73 L. Ed., 884;
Schlesinger v. Wisconsin, 270 U. S., 230, 70 L. Ed., 557;
Heiner v. Donnan, 285 U. S., 321, 76 L. Ed., 772.

It is significant that although these cases were considered by the lower courts, the Supreme Court of Ohio made no comment upon any of them and indulged in no discussion whatever as to whether or not Section 8623-72 affords a fair opportunity to repel the presumption. The Court of Appeals held that there was a fair opportunity. Judge Reynolds of the Common Pleas Court held that there was an ample opportunity and Judge Leach declared "the corporation as such had a fair opportunity."

CONCLUSION.

Summarizing the foregoing pages, it is our contention that:

(1) All the elements giving this court jurisdiction to grant a writ of certiorari are present in this case.

(2) There is involved the question of the constitutionality of an Ohio statute as measured by the Fourteenth Federal Amendment.

(3) It has been declared by the Ohio courts that that statute shall be liberally construed in favor of minority shareholders.

(4) The seventh paragraph of Section 8623-72 is mutual in its operation.

(5) There were several ways, even after the minority shareholders had made their demands, whereby the corporation or the majority shareholders could have availed themselves of legal remedies, thereby avoiding the conclusive presumption:

(a) The corporation could have offered "an amount" within ten days under the fourth paragraph of 8623-72.

(b) The corporation could have brought a suit within six months under the sixth paragraph of 8623-72.

(c) The majority shareholders or any one of them could have done likewise in the name of the corporation upon demand of and refusal by the corporation under the sixth paragraph of 8623-72.

(d) The corporation for any reason could have abandoned its purpose to sell under the third paragraph of 8623-72.

(e) The majority shareholders could have revoked the authority to sell under the third paragraph of 8623-72.

(6) Having invoked the favorable provisions of Section 8623-65 and other statutes for its own advantage and the advantage of the majority shareholders, both the corporation and the majority shareholders are estopped to claim unconstitutionality of a segregated paragraph.

(7) Judge Reynolds in a decision dismissing an intervening petition of a shareholder, held:

(a) The statute is constitutional for the reason that "the opportunity for the company to protect itself is amply provided for," and:

(b) The remedy of the majority stockholders is against the directors "who were derelict in their duty."

(8) The failure of the majority shareholders to appeal after final judgment against them when dismissed from this cause by Judge Reynolds constitutes **res judicata.**

(9) The rights of the majority shareholders as such rise no higher than the rights of the corporation.

(10) Notice by dissenting shareholders to the corporation is notice to the majority shareholders as to all matters pertaining to or growing out of the action of the shareholders at the meeting of June 2, 1936.

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

CARRINGTON T. MARSHALL,

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44 E. Broad St., Columbus, Ohio,

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IN THE

Supreme Court of the United States

No. 1035.

OLGA E. VOELLER, ET AL.,

Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

Our principal reason for filing a reply brief is that Professor Norman D. Lattin, of the Ohio State University College of Law, has recently published an article in the Michigan Law Review on the subject: "Reappraisal of Appraisal Statutes". In this article, Professor Lattin agrees with our contentions and disagrees with the decision of the Supreme Court of Ohio in the case of **Voeller v. Neilston Warehouse Company**, 136 O. S., 437.

We are filing with this reply brief nine (9) copies of that magazine with page references on the opening flyleaf and with the margin scored at the places which are applicable.

Our thought in filing these copies of the magazine is that the article and the way it is treated demonstrates the importance of the question involved and therefore the importance of the allowance of the writ of certiorari. In this case, the court that is final authority upon questions of due process under the Fourteenth Federal Amendment should be the Supreme Court of the United States and not the Supreme Court of Ohio.

We will only add that Professor Lattin, aside from being a teacher of corporation law of long standing and an author of a text book on corporation law and an author of articles published in legal periodicals, is a member of the corporation committee of the Ohio State Bar Association.

We note at page 2 of the respondents' brief as follows:

> "It is significant that there is not a single authority mentioned in the dissenting opinion on the constitutional point."

Opposing counsel apparently lose sight of the fact that the **majority** opinion of the Ohio Supreme Court **does not state a single authority on the constitutional question.**

At the bottom of page 3 and at the top of page 4 of respondents' brief, it is stated that the dissenting stockholders of the warehouse company could have filed an action within six months. Surely, the **statute** gives the corporation the same right for the same period. The **common law** gives to any **majority stockholder** the same right if the corporation neglects its duty. This **fair opportunity** takes away the force of the alleged "conclusive presumption".

Near the top of page 4, it is stated that the demands of the dissenters were exorbitant. This is entirely beside

the question. If the demands were exorbitant, the entire difficulty could have been obviated by a counter offer. If an answer to this charge is necessary, that answer is, that the record shows that the stock was worth one hundred dollars ($100.00) per share and that the majority, for purposes of their own, made a sale at a ruinous price.

At the bottom of page 4 of respondents' brief, it is declared that in stating that Section 8623-72 is separate and distinct from Section 8623-65, the Supreme Court of Ohio was merely construing Ohio statutes. This is very far from being an accurate statement. We again point out that Subsection 65 in its closing paragraph definitely states:

> "Dissenting shareholders, whether or not entitled to vote, shall be entitled to the relief in the manner and under the conditions hereinafter provided."

It follows that the declaration of the Ohio Supreme Court is not a matter of construction of statutes but it is a matter of substance and shows that the Supreme Court of Ohio failed to appreciate that the two statutes are tied together. It is not in any sense a local matter and it is not a matter of construction.

Respondents' brief cited the case of **United States v. Carver**, 260 U. S., 482, to the effect that a denial of certiorari does not import an expression of opinion upon the merits of the case. Our reply to this is that as the matter now stands the decision of the Ohio Supreme Court will be binding upon Ohio courts and a persuasive authority in the courts of other states. If it is unsound, it ought to be corrected before it becomes a finality. It could be cited in any case involving "conclusive presumptions" whether relating to appraisal statutes or what not.

In a broader sense, the question is important to every

corporation in every state of the union, because the law in Ohio should be the law in each of the forty-eight states; and it would be unfortunate if in any case where a dissenting shareholder becomes entitled to be paid the fair cash value for his shares, whether because of an amendment to the articles of incorporation, or because of a merger, or consolidation, or as in this case, because of a sale of substantially all the corporate assets, each dissenting shareholder must notify each and every of the majority shareholders of his demands, and, if it becomes necessary to file suit on such demands, make each and every such individual majority shareholder a party to the suit to the end that **"due process"** shall be had.

We think the decision of the Ohio Supreme Court is so essentially unsound that it ought to be reviewed by the highest authority on questions of due process as guaranteed by the Fourteenth Federal Amendment.

Respectfully submitted,

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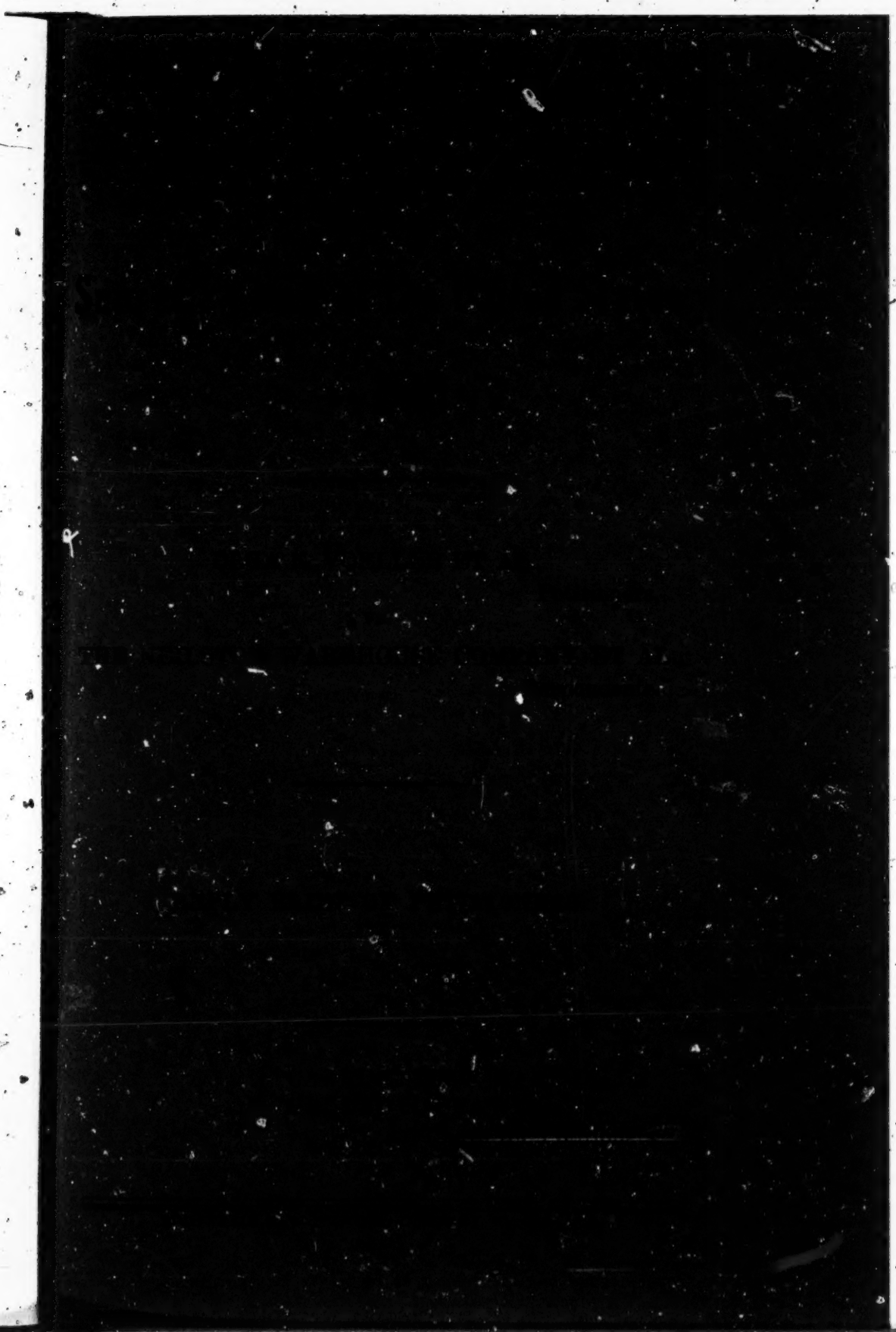

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IN THE

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OLGA E. VOELLER ET AL.,

Petitioners,

vs.

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Respondents.

REPLY BRIEF OF PETITIONERS.

It is to be feared that the elaborate briefs already filed in this case will have the effect of making a very simple matter have the appearance of a difficult and complex problem. As a matter of fact it is a simple matter. The ultimate question is as to whether the requirement in the Ohio appraisal statute that the corporation shall make a counter offer within 10 days after the dissenting stockholders have made their demand is sufficiently burdensome to constitute the violation of due process. Or to put it differently whether the simple expedient of making a counter offer which if it had been made in this case would have obviated this controversy, is the denial of a fair opportunity to the corporation to obviate the so-called conclusive presumption which according to the

technical language of the statute forecloses final inquiry as to value.

There is of course the further question which has been injected into this case as to whether the stockholders have had a **fair opportunity** and whether the stockholders have rights separate and distinct from the corporation itself in proceeding under these appraisal statutes. This subject will be dealt with later.

I. Correction of Respondents' Statement of Facts.

The brief of respondents contains an elaborate statement of facts which are for the most part accurate but we are compelled to take violent issue upon certain statements.

It is our contention that the real value of the stock is not an issue in this case. But inasmuch as it is sought by respondents to make value an issue we desire to correct an impression which might be created by reading the fourth and fifth pages of respondents' brief. The effort to make value an issue is neither more nor less than an assault upon the emotions of this court and to arouse sympathy for the majority stockholders who have imposed their will upon the dissenting minority. It is stated at page 5 of respondents' brief that the total of all claims of the minority stockholders amounts to $72,160.00. This figure represents the total claims of all dissenting stockholders who originally made demands within the 20-day period. Only a limited number pursued their claims to the point of litigation. The total amount necessary to satisfy the claims of petitioners in this action is $25,280.00. It may be that if all of the dissenting stockholders had brought action that it would have had the

effect of reducing the amount which would be received by respondents to $13.00 per share but inasmuch as it takes only $25,280.00 to satisfy the claims of the minority stockholders the reduction would be less than $4.00 per share, instead of $12.00 per share as claimed by respondents.

It must constantly be kept in mind that the majority stockholders have imposed their will upon the minority in forcing a sale of assets at a ridiculous figure. The purpose of the majority stockholders was not developed in the evidence and we will therefore omit any discussion of the reasons. It does appear in the record that this corporation was not a failing concern or even a waning enterprise. The company was in fact paying dividends and at the same time it was applying $500.00 monthly upon the principal of mortgage indebtedness. If the majority stockholders found it to their personal advantage to force a ruinous sale upon the minority stockholders, surely there is no place for asking this court to waste sympathy upon the majority.

The minority stockholders demanded $100.00 per share which we confidently assert was its real value. The corporate books which are made up for the purposes of taxation, are usually on a basis of value which is much less than the real value, and in fact this company, according to its books, had assets making its stock more than $60.00 per share. (Record, p. 33 and Exhibit 1, page 73.)

II. Is This a Controversy Between Two Classes of Stockholders?

Another inaccuracy in the statement is the endeavor to create the impression that this is a controversy between two classes of stockholders. As a part of this effort it is stated at page 2 of respondents' brief, "The company was not operating any business. It was simply endeavoring to liquidate as soon as it could sell the remainder of its property."

The brief contains its own refutation. The meeting of stockholders to authorize the sale was held on June 2, 1936 (See page 3 of respondents' brief). Thereafter the company continued business until August 13, 1936, at which time the directors authorized dissolution proceedings (See page 4 of respondents' brief). This meeting of the directors was 10 weeks later than the stockholders' meeting and in the meantime the corporation continued its business.

The evident purpose of this false impression is to make it appear that there were two classes of stockholders which would give application to the case of Geiger v. American Seeding Machine Co., 124 O. S., 222. The purpose in trying to apply the Geiger case to this controversy is apparent. The Geiger case was a case between preferred and common stockholders after sale of assets and the controversy arose during the process of distribution. In the instant case there could be only one class of stockholders because there were no preferred stockholders in The Neilston Warehouse Company.

III. Was the Corporation in Liquidation on June 2, 1936?

Note that the corporation did not vote to liquidate. It could have done so under Section 8623-79 "when substantially all the assets have been sold."

The only question considered, or which the corporation submitted for consideration at the shareholders' meeting on June 2, 1936, was a sale of certain assets. (Record, page 1.)

It was under Section 8623-79 after the sale of substantially all assets, that the board of directors resolved on August 13, 1936, to liquidate and named a liquidator.

The corporation through its board of directors had no such authority until after such sale had been authorized on June 2, 1936.

Petitioners' cause of action arose long prior to such resolution to liquidate.

The liquidation proceedings were not instituted until August 13, 1936.

Mere discussion of the possibility of a liquidation at a meeting of the board of directors on June 16, 1936, did not constitute liquidation, or even an initiation of liquidation proceedings—but even if it had, such discussion took place two weeks after the action taken by the majority shareholders for sale of substantially all assets.

We stress these facts because of the emphasis placed by the respondents upon the **false** claim that the corporation was in the process of liquidation at the time of the shareholders' action on June 2, 1936.

The corporation was not only **not** in liquidation at the time of the meeting on June 2, 1936, when the majority shareholders voted to authorize the sale of certain assets,

but **no action** was then taken or considered by the shareholders toward authorizing the corporation or the board of directors to "divide or distribute such consideration among the shareholders", which authority was necessary under General Code 8623-65 before the board of directors might make any such division or distribution.

IV. Is this a Matter of Local Law or Does It Present a Federal Question?

In the brief of counsel for respondents at pages seven, eight and nine, there is a discussion of the proposition that this controversy involves only local law concerning which the Supreme Court of the United States will follow the decision of the state court.

It would seem that little notice should be given to this claim, but since it is seriously urged, it will be seriously answered. This cause has been admitted to this court upon allowance of a petition for certiorari. It will be assumed that in granting the motion, the members of this court had not failed to observe the character of the judgment of the Supreme Court of Ohio, and the points decided by that court. If the decision of the Ohio Supreme Court involved only an interpretation of the Ohio statute and if the validity of the statute were not also involved, we would not claim that this court would exercise jurisdiction. It is our contention that the decision of the Ohio Supreme Court did not involve **construction** of a statute. It involved purely and simply the **validity** of the Ohio statute.

Construction in 12 C. J., p. 1301, is defined as:

> "The process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, etc."

Upon this point we quote the admission found on page 19 of respondents' brief:

> "There is no ambiguity in the statute. Hence no construction is required and that principle is not involved. The question is purely and simply one of constitutionality with the attendant requirement that every reasonable presumption in favor of constitutionality will be indulged."

We have examined all of the cases cited on pages 7, 8 and 9 and we find not a single case where this court has refused jurisdiction where the state court has based its decision upon the validity or invalidity of a state statute. It is true that in some of those cases the state court had in fact resorted to interpretation. In those cases this court held that in considering the question of validity under the federal Constitution this court would give the state statute the meaning which the state court had declared. In those cases this court did in fact entertain jurisdiction and did consider and decide the question of constitutionality after giving to the statute the meaning as declared by the state court in each case.

There was neither discussion nor decision of meaning of statute or legislative intent, in the instant case. The decision of the state court was that the statute according to its plain meaning was a violation of due process. If such a decision involving as it does purely a question of constitutionality as measured by the federal Constitution is binding upon this court, it is difficult to conceive of an appeal from a state court to this court, in any case.

We must, therefore, decline to enter upon a discussion of those cases. We do, however, point out that the quotations found on page 8 and at the top of page 9, of respondents' brief fully bear out our contention, namely,

that while the state court may properly determine the meaning of the statute, it still remains for this court to determine whether the statute as construed is constitutional.

Opposing counsel have failed to discern the distinction between construction and validity. Upon this point we quote from the case of Glen v. Garth, 147 U. S., 360, 37 L. Ed., 203:

> "This court has no jurisdiction to review the decision of a state court upon the ground that in such decision error intervened in the construction of a statute in another state; there is a distinction between the construction of a statute and the validity of such statute."

That distinction is elaborated upon in the opinion of Chief Justice Fuller in which he cites early cases and more particularly an opinion of Chief Justice Taney in the case of Grand Gulf, etc., v. Marshall, 52 U. S., 12, 13 L. Ed., 938.

We heartily agree with the conclusion reached by respondents as declared at page 9 of their brief. "We recognize, of course, that the ultimate question of due process is for this court."

V. Does the Ohio Statute Afford a Fair Opportunity to Avoid the So-called Conclusive Presumption?

At pages 10 and 11 of respondents' brief this subject is discussed and numerous former decisions of this court are cited. We shall not quote or discuss any of those cases. It is sufficient to say that some of those same cases are cited and discussed in petitioners' opening brief at pages 46 and 47, and that we have carefully examined all cases cited by respondents and we find that in every

one of those cases the decision turned upon the one question as to whether or not a **fair opportunity** was afforded.

And in none of those cases was an opportunity afforded **either before or during the proceeding to repel, avoid or escape the objectionable presumption.**

Both in the argument and in the conclusion of petitioners' opening brief it is pointed out that there were at least five distinct ways, even after the minority shareholders had made their demands, whereby the corporation or the majority shareholders could have availed themselves of legal remedies, or complied with conditions precedent, thereby avoiding the conclusive presumption, to wit:

(a) The corporation could have offered "an amount" within 10 days under the fourth paragraph of 8623-72.

(b) The corporation could have brought a suit within 6 months under the sixth paragraph of 8623-72.

(c) The majority shareholders or any one of them could have done likewise in the name of the corporation upon demand of and refusal by the corporation under the sixth paragraph of 8623-72.

(d) The corporation for any reason could have abandoned the purpose to sell under the third paragraph of 8623-72.

(e) The majority shareholders could have revoked the authority to sell under the third paragraph of 8623-72.

It becomes therefore a question as to whether any one of the simple expedients in the hands of the corporation or the majority shareholders does afford a fair opportunity to obviate the so-called conclusive presumption. And will the corporation be heard to complain after hav-

ing deliberately refused to avail itself of this simple expedient? Can it be said that in view of the facility with which the corporation as well as the majority shareholders could obviate the presumption that the statute operates as an arbitrary denial of a fair opportunity to repel the presumption?

As bearing upon the neglect of the corporation to make a counter offer we call attention to the reply which the corporation made to the petitioners' demands:

> "Your demand for payment is refused. The purpose for which the Neilston Warehouse Company was incorporated has been abandoned." (Record, page 62, also Exhibit 8.)

We think that when the corporation at a later date than June 2, 1936, did sell the balance of its property and did resolve to liquidate, it took such action for one purpose only, and that was to attempt to circumvent and defeat these plaintiffs in the prosecution of their respective claims.

We believe when the court considers the contents of the above quoted letter in reply to written demands, the force of our assertion will be apparent.

At that time no action had been taken toward liquidation. That action was not taken until August 13, 1936. The strategy conceived by the corporation is too apparent. It was sought by wrong interpretation of the phrase "abandon its purpose", contained in paragraph 3 of Section 8623-72, and by construing the phrase to mean abandonment of the purpose for which the company was incorporated, to make the dissenting shareholders believe that by the simple expedient of abandoning the corporate purpose they had lost their statutory rights as dissenters. The dissenting shareholders at this juncture sought legal advice and learned that the abandonment referred to the proposed sale.

VI. Have the Rights of Majority Shareholders as Such Been Violated?

This subject occupies respondents' brief from pages 12 to 19 inclusive. We have dealt with this subject in our opening brief at pages 30 to 37 inclusive, wherein we point out that notice to the corporation is notice to majority shareholders and that majority shareholders or any one of them could have acted in the name of the corporation.

We do not feel justified in continuing that discussion or in answering that discussion in respondents' brief further than to say that the decision of the Ohio Supreme Court is based upon the claim that the controversy was between two classes of shareholders and that the brief of opposing counsel naturally adopts the same view.

The obvious answer is that The Neilston Warehouse Company had only one class of shareholders and it does not create two classes of stockholders because there was a difference of opinion among the shareholders of the same class on the subject of making a sale of substantially all assets.

This being so the cases cited in respondents' brief have no application.

If each such individual is entitled to notice of the demands of dissenting shareholders in case of sale of substantially all assets, as is claimed by the respondents in this case, then it follows that each such individual majority shareholder would be entitled to individual and separate notices in event:

1. The corporation has voted to merely lease or exchange substantially all assets under General Code Sections 8623-65 and 8623-72.

2. When the corporation has merely amended its articles of incorporation under Sections 8623-14, 8623-15 and 8623-72.

3. When a consolidation or reorganization has been authorized under Section 8623-72.

4. When a merger or consolidation has been effected under Sections 8623-67 and 8623-72, or

5. When a reorganization has been effected under General Code Sections 8623-15a and 8623-72.

At page 18 of respondents' brief it is conceded that where irreparable injury is threatened to a corporation and it refuses to act upon demand, a stockholder may bring an action in the name of a corporation to avoid this conceded proposition of law. It is said that it only applies where the shareholders have knowledge of the threatened damage.

Surely the majority stockholders having participated in the meeting and having imposed their will upon the minority must be held to have knowledge of the subsequent demand of the minority and the failure and refusal of the corporation to make a counter offer. This was pointed out with emphasis in the opinion of Judge Geiger in his opinion in the Court of Appeals in this case.

CONCLUSION.

In conclusion we call attention to an article written by Professor Norman D. Lattin of Ohio State University, School of Law, and an author of distinction on corporate subjects, published in the Michigan Law Review in June, 1940, on the subject "Reappraisal of Appraisal Statutes", copies of which have been heretofore furnished to the members of this court. We particularly refer to the discussion in the article of The Neilston Warehouse Com-

pany case beginning at page 1173 and ending at page 1181. We also again call attention to the dissenting opinions of Judge Hart and Judge Myers of the Ohio Supreme Court and the quotation from the opinion of Judge Myers found at pages 42 and 43 of our opening brief. The full opinion of these two judges is found at pages 82, 83 and 84 of the transcript of record.

Respectfully submitted,

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ORLAND R. CRAWFIS,

Attorneys for Petitioners.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 10[redacted]97

OLGA E. VOELLER ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' ANSWER TO PETITIONERS' REASONS FOR ALLOWANCE OF WRIT.

The Supreme Court of Ohio, in a six-to-one decision, upheld the constitutional guarantee of due process under the Fourteenth Amendment. In so doing it followed well recognized principles of law. These principles have been repeatedly stated by this Court with consistent uniformity.

Indeed, we know of no authority which is out of harmony with the decision of the majority.

It is significant that there is not a single authority mentioned in the dissenting opinion on the constitutional point.

The Supreme Court of Ohio held (we quote the syllabus):

> "1. The constitutionality of a law may be determined by its operative effect.
>
> 2. A statute, the operative effect of which is to deprive a person of his property without notice and without opportunity to be heard before a competent tribunal, is violative of Section 1 of the 14th Amendment to the federal Constitution.
>
> 3. That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process to the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation."

This is the law decided by the Supreme Court of Ohio in this case. In Ohio the propositions of law decided in any given case are those stated in the syllabus of the case. *Baltimore & Ohio Rd. Co. v. Baillie,* 112 O. S. 567, 148 N. E. 233 (1925). Or, as differently expressed, the points decided are found in the syllabus. *Wrede v. Richardson,* 77 O. S., 182, 82 N. E. 1072 (1907). Matter outside the syllabus is not regarded as decision. *Haas v. State,* 103 O. S. 1, 132 N. E. 158 (1921).

That the constitutionality of a law may be determined by its operative effect is not open to dispute. Indeed it is conceded by opposing counsel at page 16 of the petition. This Court has many times stated this principle.

Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455 (1890).

Likewise, the proposition stated in the second branch of the syllabus is well established and is conceded by opposing counsel at page 16 of the petition. It has been recognized and approved over and over again by this Court.

Railroad Com. of Cal. v. Pacific G. & E. Co., 302 U. S. 388, 82 L. Ed. 319 (1938).
Baltimore & Ohio R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 1209 (1936).
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158 (1932).
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027 (1915).

So also as to the third branch of the syllabus, holding the statutory conclusive presumption to be unconstitutional.

Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191 (1911).
Heiner v. Donnan, 285 U. S. 312, 76 L. Ed. 772 (1932).
Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. Ed. 557 (1926).
Manley v. Georgia, 279 U. S. 1, 73 L. Ed. 575 (1929).
Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 73 L. Ed. 884 (1929).

Other principles of law *discussed*, but not decided, in the opinion relate only to local law. Opposing counsel concede this in paragraph (11) on page 22 of the petition. This is so principally because the statutory provision in question is found in no other state excepting Rhode Island, which copied this provision from the Ohio Act in 1932. It has never been approved by the National Conference of Commissioners on Uniform Laws nor has it been included as a part of the Uniform Corporation Act. Moreover, the factual situation here is singularly unique because minority shareholders can, under §8623-72, and almost invariably do, bring actions within the time limit prescribed by the

section (six months) to have the fair cash value of their shares determined in a perfectly constitutional manner. The dissenters here, having demanded exorbitant amounts (four times as much as their pro rata distributive shares, i. e., $100 per share as against $25 per share) sought by the aid of the conclusive presumption to preclude inquiry into the value of their shares and thereby to obtain approximately $100 per share, which would have resulted in other shareholders receiving only about $13 per share.

It is clear, therefore, that there are no special and important reasons for granting a writ in this case. Nor can it be said that the Supreme Court of Ohio (a) has decided a federal question of substance not heretofore decided by this Court, or (b) has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court.

It should be added that other principles of law *discussed* in the majority opinion, involving non-federal questions, are amply supported by authority.

The statements at pages 17 and 18 of the petition as to the "redress" of the minority shareholders are without merit because, as stated above, such minority shareholders have the right, under §8623-72 G. C., to file actions, when their demands are refused, to have the fair cash value of their shares determined in the manner provided by the statute. The decision below has not altered or impaired this right.

In stating that §8623-72 G. C. is separate and distinct from §8623-65 G. C., the Supreme Court of Ohio was merely *construing* the statutes—a matter with which this Court is not concerned. *Neblett v. Carpenter*, 305 U. S. 297, 83 L. Ed. 182 (1938). Such *construction* is in no way related to the constitutional question here involved.

Of course, neither American Telephone & Telegraph Company, United States Steel Corporation, nor General Motors Corporation, nor any other corporation not organized under the laws of Ohio, are remotely affected by this decision for the simple reason that the states of their incorporation have no similar statutory conclusive presumptions. As to Proctor & Gamble Company, an Ohio corporation, the rights of dissenting shareholders, as pointed out above, are still adequately protected under §8623-72 G. C. and the statement that they are "without remedy" or are denied "redress" is clearly erroneous. Such shareholders need only make their demands and, if such demands are refused and negotiation fails, they may file actions to have the fair cash value of their shares determined and paid.

From what has been said it must be apparent that the application of the constitutional principles here involved to the facts of this case cannot be a precedent for other states because, excepting Rhode Island, they have no similar statutory provision.

It is, of course, well settled that a denial of a petition for certiorari by this Court does not, as suggested by opposing counsel at page 20 of the petition, import an expression of opinion upon the merits of a case.

U. S. v. Carver, 260 U. S. 482, 67 L. Ed. 361 (1923).

ANSWER TO PETITIONERS' BRIEF.

The petitioners' brief is devoted almost exclusively to a discussion of the *construction* of the Ohio statutes and of general principles of local law with which this Court is not here concerned. *Neblett v. Carpenter, supra.*

Certainly the discussion relative to possible conflicts between decisions of inferior courts of Ohio is of no moment here. If it were, it could be clearly shown that no such conflict exists.

There is nothing in *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401 (1856), which has any bearing on the constitutional point. Moreover, the principle for which this case is cited relates to local or non-federal law. But most important, the court below, in the instant case, discussed this point in connection with the *construction* of §8623-72 G. C., Transcript of Record, p. 109.

Nowhere is it pointed out in the petitioners' brief that the Supreme Court of Ohio has decided a federal question of substance not heretofore decided by this Court or not in accord with the applicable decisions of this Court. The nearest approach is on page 37 of petitioners' brief under the heading "ESTOPPEL BY ACCEPTING BENEFITS." The subject of estoppel, however, is not a federal question and moreover the whole argument of estoppel is based upon the contention that §8623-65 and §8623-72 G. C. are one and the same and should be so *construed*. The Supreme Court of Ohio, however, has *construed* these Ohio statutes differently and accordingly the whole argument of estoppel fails. Hence, it cannot be said that the decisions of this Court, cited at the bottom of page 37 of petitioners' brief, are not in accord with the decision of the Supreme Court of Ohio.

The case of *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552 (1899), is not applicable. In the opinion it is expressly stated:

> "The cases cited by plaintiff in error, which hold that the legislature may give the effect of prima facie proof to certain acts, but not conclusive proof, do not apply."

That case merely involved the right of the legislature to restrict contractual provisions in fire insurance policies.

Manley v. Georgia, supra, referred to at page 46 of the petitioners' brief, is clearly in accord with the decision of the Supreme Court of Ohio. Likewise, the cases of *Western & Atlantic Railway v. Henderson, supra, Schlesinger v. Wisconsin, supra,* and *Heiner v. Donnan, supra,* are not only in accord with, but fully support, the decision of the Supreme Court of Ohio. Opposing counsel are in error in stating, at page 47, that the Supreme Court of Ohio "indulged in no discussion whatever as to whether or not Section 8623-72 affords a fair opportunity to repel the presumption." For such discussion see Transcript of Record, pp. 110 et seq.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. [redacted]97

OLGA E. VOELLER ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,
Respondents.

BRIEF OF RESPONDENTS.

Due process of law inhibits the taking of one man's property and giving it to another without notice and an opportunity to be heard before a competent tribunal.

A statute creating a presumption which operates to deny a fair opportunity to rebut it is violative of due process.

Principles of local law, including those governing the relationship of shareholders INTER SE and with the corporation, announced by the Supreme Court of Ohio will be accepted by this Court.

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IN THE

Supreme Court of the United States

No. 1035.

OLGA E. VOELLER ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,
Respondents.

BRIEF OF RESPONDENTS.

OPINION BELOW.

The only reported opinion of the courts below is that of the Supreme Court of Ohio in 136 O. S. 427; 26 N. E. (2d) 442.

STATEMENT OF CASE.

The statement of facts, in petitioners' brief, is so meager that we deem it necessary to make a rather complete statement.

The G. W. Bobb Company was incorporated in 1903 and carried on a wholesale grocery business in Columbus, Ohio, for many years. In 1925 it encountered bad

times and negotiated for the sale of its business, property and assets. As a result of these negotiations it sold all of its merchandise to The Midland Grocery Company. (R. 50.) There being no proposal to purchase its remaining assets, nothing was then done in respect thereto. The company at that time owned a large building which it had used in its business and it also owned another piece of real estate located nearby. After the sale of its merchandise both pieces of real estate were listed with several real estate dealers in an effort to dispose of them so that the company could liquidate. A number of offers were received but none which the board of directors would accept. The company was not operating any business; it was simply endeavoring to liquidate as soon as it could sell the remainder of its property. (R. 52-53.) In 1926, the second piece of real estate mentioned above was disposed of and the proceeds from this sale were used to retire the company's preferred stock. (R. 53.) In 1927 the name of the corporation was changed to The Neilston Warehouse Company and at the same time its articles of incorporation were amended so as to permit it to engage in a warehousing business until it could sell the remaining property and complete liquidation.

In April, 1936, it received a proposal for the purchase of the large building referred to above which its directors were willing to submit to the shareholders. This proposal came from the Irwin Realty Company, which offered to pay $101,560.00 and assume the first mortgage on the property of approximately $70,000.00. Of the $101,560.00, $25,000.00 was to be paid in cash and the balance was to be evidenced by a note secured by a second mortgage payable over a period of years. A special meeting of the shareholders was called to con-

sider the proposal. Not quite two-thirds of the shares were voted in favor of the proposal, as was required by law, and hence the proposal was not accepted. (R. 54-55.)

In May, 1936, the company received an offer from The Creasey Corporation of Louisville, Ky., to purchase the property for $126,950.00 and assume the first mortgage of approximately $70,000.00. Of this purchase price $25,000.00 was to be paid in cash and the balance was to be evidenced by a note secured by a second mortgage on the property payable over a period of years. (R. 55.)

The shareholders were duly notified of this proposal and a special meeting was held on June 2, 1936. Of the 5078 shares issued and outstanding, 4783 shares were represented at the meeting either in person or by proxy. Of these, 3658 shares voted for the proposal and 1125 shares voted against the proposal. More than two-thirds of the shares having voted for the proposal, the sale was consummated. (R. 2; 4.)

The Board of Directors at a meeting held on June 16, 1936, discussed the appointment of a liquidating agent to handle the distribution of assets to the shareholders. (R. 29.)

The holders of 818 of the 1125 dissenting shares, presumably acting under § 8623-72 of the Ohio General Code, thereafter filed written objections and demands with the company within the twenty day period fixed by the statute. Other shareholders had no notice of such demands. The president of the company by letter refused the demands, although no director's meeting was held in respect thereto. (R. 55; 62.)

It should here be noted that all of the shareholders became such before the enactment of the statutory provisions here in question. (R. 58.)

On August 13, 1936, the directors authorized dissolution proceedings, appointed the defendant, The Ohio National Bank, as liquidating agent, and thereafter transferred and delivered to it all cash and remaining assets, including accounts receivable and the note and mortgage of The Creasey Corporation. (R. 3.)

No suits were filed either by the corporation or by the dissenting shareholders within the six months' period prescribed in § 8623-72.

On January 8, 1937, suits were filed by certain dissenting shareholders. These dissenters sought to recover judgments for the amounts specified in the demands filed by them which were substantially $100.00 per share, upon the theory that the conclusive presumption contained in the seventh paragraph of § 8623-72 foreclosed any inquiry into the fair cash value of their shares. (R. 1-4.) The defendants (respondents here) by answers challenged the constitutionality of this paragraph as being violative of the due process clause of the 14th Amendment to the Constitution of the United States and claimed that the proceeds of the sale should be distributed pro rata among all shareholders alike. (R. 4-7.)

All the cases were tried together and have since proceeded as a consolidated case. The trial court sustained the contention of the defendants and entered judgments for the defendants. (R. 89, 14.) The Court of Appeals, by a divided court, reversed. (R. 93) The Supreme Court of Ohio reversed the Court of Appeals and affirmed the trial court, the syllabus of its opinion being as follows:

"1. The constitutionality of a law may be determined by its operative effect.

2. A statute, the operative effect of which is to deprive a person of his property without notice and

without opportunity to be heard before a competent tribunal, is violative of Section 1 of the 14th Amendment to the Federal Constitution.

3. That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process to the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation." (R. 74.)

The case is here on allowance of petition for writ of certiorari.

It will be noted from the above statement that the dissenting shareholders who filed demands have claimed for the most part $100.00 per share. The total of all of these claims is $72,160.00. The total amount for distribution, after the payment in full of The Creasey Corporation note, with interest, will be approximately $130,000.00. A pro rata distribution of this latter amount, share and share alike, among all the shareholders, would be approximately $25.00 per share. The dissenters who filed demands owned 16% of the shares. If all of their claims were to be allowed they would receive almost 57% of the amount to be distributed. The remaining shareholders, holding 84% of the shares, would receive only about 43% of the amount to be distributed or about $58,000.00. Most of the dissenters would receive $100.00 per share, whereas the holders of the remaining 4260 shares would receive only about $13.00 per share.

THE STATUTE INVOLVED.

§ 8623-72 of the General Code of Ohio is quoted at pages 5-7 of petitioners' brief.

As originally enacted in 1927 the Ohio Corporation Code did not contain the conclusive presumption now found in the seventh unnumbered paragraph of § 8623-72.

The 1929 amendment, introducing the conclusive presumption, was a novel and unique departure from existing corporation statutes. No similar provision had been enacted by any state. Nor had it been included in the Uniform Corporation Act. The National Conference of Commissioners on Uniform Laws has not since its adoption in Ohio included a similar provision in the Uniform Act. No other state has it except Rhode Island, which recently copied it from Ohio.

SUMMARY OF POINTS DISCUSSED.

I. A corporation is governed by the law of the state of its incorporation and this includes the relationship of shareholders inter se and with the corporation.

II. This Court will accept the decision of the Supreme Court of Ohio on the construction of Ohio statutes and on the common law of Ohio.

III. Due process of law requires notice and an opportunity to be heard.

IV. A statute creating a presumption which operates to deny a fair opportunity to rebut it is violative of due process.

V. The statute provides for no notice to the majority shareholders of the demands of the dissenters and they received none.

VI. The majority shareholders had no opportunity to be heard.

VII. Miscellaneous points.

ARGUMENT.

I.

A Corporation Is Governed by the Law of the State of Its Incorporation and This Includes the Relationship of Shareholders Inter Se and With the Corporation.

A corporation, being the creature of the state of its incorporation, is governed and controlled by the local law of that state. This includes the relationship between the shareholders *inter se* and with the corporation. Such local law becomes a rule of property governing such relationships. *Black et al.* v. *Zacharie & Co.*, 3 How. 483, 511; 11 L. ed. 690, 703 (1845); *Fairfield* v. *Gallatin County*, 100 U. S. 47; 25 L. ed. 544 (1879); *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; 77 L. ed. 652 (1933).

The relationship of the shareholders of The Neilston Warehouse Company, in the situation with which we are here dealing, is governed by the law of Ohio. A statement of that law is made in the decision of the Supreme Court of Ohio. That Court, in construing the pertinent statutes of Ohio relating to a corporation and its shareholders, has announced the principles which govern the status of the shareholders and their relationship *inter se* and with the corporation.

II.

This Court Will Accept the Decision of the Supreme Court of Ohio on the Construction of Ohio Statutes and on the Common Law of Ohio.

It is well settled that this Court, when dealing with the constitutionality of state statutes challenged under the Fourteenth Amendment of the Federal Constitution, will accept the construction of such statutes by the highest court of the state.

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; * * *. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action."
>
> *Ward* v. *Krinsky*, 259 U. S. 503, 510; 66 L. ed. 1033, 1036 (1922).

> "The decision of the state court is controlling as to the meaning and extent of the statutory requirements."
>
> *Hicklin* v. *Coney*, 290 U. S. 169, 172; 78 L. ed. 247, 250 (1933).

> "By that construction" (that of the state Supreme Court) "we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text."
>
> *Georgia R. & Elec. Co.* v. *Decatur*, 295 U. S. 165, 170; 79 L. ed. 1365, 1369 (1935).

> "The questions just stated are questions of local law, and in determining whether the statute violates

any right secured by the Federal Constitution we must, in the particulars named, accept the interpretation put upon it by the state court."

W. W. Cargill Co. v. *Minn. ex rel. R. R. & W. Com.*, 180 U. S. 452, 466; 45 L. ed. 619, 626 (1901).

C. & O. R. R. Co. v. *Kentucky*, 179 U. S. 388; 45 L. ed. 244 (1900).

Smiley v. *Kansas*, 196 U. S. 447, 455; 49 L. ed. 546, 550 (1905).

Farncomb v. City and County of Denver, 252 U. S. 7; 64 L. ed. 424 (1920).

Roe v. *Kansas ex rel. Smith*, 278 U. S. 191; 73 L. ed. 259 (1929).

Morehead v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587, 609; 80 L. ed. 1347, 1354 (1936).

Neblett v. *Carpenter*, 305 U. S. 297; 83 L. ed. 182 (1938).

Continental Assurance Company v. *Tennessee*, decided by United States Supreme Court on October 21, 1940.

Likewise in such cases, this Court will accept the applicable common law of the state as announced by the highest court of the state.

American Ry. Express Co. v. *Kentucky*, 273 U. S. 269; 71 L. ed. 639 (1927).

We recognize, of course, that the ultimate question of due process is for this Court. The Supreme Court of Ohio has, however, in its decision, construed certain Ohio statutes and announced certain principles of common law relating to Ohio corporations and their shareholders. Under the above decisions this Court will give effect to such statutory construction and such principles of local law in determining whether or not due process has been denied.

It should be noted that the decision below did not *deny* —but, on the contrary, *upheld*—the constitutional rights of respondents.

III.

Due Process of Law Requires Notice and an Opportunity to Be Heard.

For convenience we will refer to the dissenting shareholders who filed demands as the "dissenters" or as "dissenting shareholders," and to the remaining shareholders as the "majority" or as "majority shareholders."

Stated briefly, the position of the respondents (defendants below) is that *notice* and an *opportunity to be heard* are of the most important elements of due process of law; that the failure of the statute to provide either for notice to the majority or an opportunity for them to be heard before a competent tribunal, coupled with the conclusive presumption, operates, under the circumstances of this case, to deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

It is elementary that notice and an opportunity to be heard are indispensable requirements of due process.

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."
>
> *Ochoa* v. *Hernandez Y Morales*, 230 U. S. 139, 161; 57 L. ed. 1427, 1437 (1913).

Baltimore & Ohio R. Co. v. *U. S.*, 298 U. S. 349; 80 L. ed. 1209 (1936).

Powell v. *Alabama*, 287 U. S. 45, 77 L. ed. 158 (1932).

Coe v. *Armour Fertilizer Works*, 237 U. S. 413; 59 L. ed. 1027 (1915).

Railroad Com. of Cal. v. *Pacific G. & E. Co.*, 302 U. S. 388; 82 L. ed. 319 (1938).

There is no dispute here as to this principle.

IV.

A Statute Creating a Presumption Which Operates to Deny a Fair Opportunity to Rebut It Is Violative of Due Process.

This Court has repeatedly declared that a statutory conclusive presumption is such a presumption and is, therefore, invalid under the due process clause.

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment."
>
> *Heiner* v. *Donnan*, 285 U. S. 312, 329; 76 L. ed. 772, 781 (1932).
>
> *Schlessinger* v. *Wisconsin*, 270 U. S. 230; 70 L. ed. 557 (1926).
>
> *Bailey* v. *Alabama*, 219 U. S. 219; 55 L. ed. 191 (1911).

A similar declaration has been made concerning even *prima facie* presumptions which operate to deny the requisites of due process.

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. * * Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."
>
> *Manley* v. *Georgia*, 279 U. S. 1, 73 L. ed. 575 (1929).
>
> *Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639; 73 L. ed. 884 (1929).

V.

The Statute Provides for No Notice to the Majority Shareholders of the Demands of the Dissenters and They Received None.

The controversy here is as to the manner of the distribution of the assets of a corporation in liquidation. It is purely a controversy between two classes or groups of shareholders, (1) dissenting and (2) non-dissenting. Accordingly, only the individual rights of shareholders are involved. This was the holding not only in the decision below but also in *Geiger* v. *American Seeding Machine Co.*, 124 O. S. 222; 177 N. E. 594 (1931). That the decison below is sound is clear from the fact that the corporation, being in liquidation, was a mere stakeholder of certain property which it was required to distribute to the only interested parties—the shareholders.

§ 8623-72 provides that after the demands of the dissenters, the corporation shall inform such dissenters whether it will meet such demands or shall make a counter-offer. The only notice provided for is to the corporation. None is provided for the majority shareholders. That they received no actual notice in the case at bar is, of course, conceded. Petitioners attempt to meet this requisite of due process by resort to constructive or imputed notice.

First, it is urged that the majority shareholders, having voted in favor of the sale at the meeting held pursuant to § 8623-65, and knowing that certain votes were cast against the sale, were charged with notice of further proceedings taken pursuant to § 8623-72. (Petitioners' brief, pp. 33-36.) These are two separate and distinct

provisions—each relating to a separate subject matter. The former deals with corporate action taken by shareholders; the latter with the rights of shareholders. There is nothing in reason or authority to suggest that, merely because certain shareholders dissented to certain corporate action, they would file demands under § 8623-72 or that, if filed, these demands would be rejected. The voting and the later conduct of the dissenters were separate and distinct matters. There is obviously nothing in the mere fact of dissent which suggests further individual action. The Ohio Supreme Court, however, both in the instant case and in its earlier decision in *Geiger* v. *American Seeding Machine Co.*, supra, has construed these two sections as being "separate and distinct and (to) cover different subjects." That Court, further construing these two statutes, has held that by voting under the former, the majority were not chargeable with notice of proceedings under the latter, because "the voting and the later conduct of the minority were separate and distinct matters." These are plainly matters of statutory construction. Moreover, they relate to corporate relationships. Accordingly, the decision of the Ohio Supreme Court will be accepted by this Court.

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 480; 76 L. ed. 1232, 1238 (1932).
Herbert v. *Louisiana*, 272 U. S. 312; 71 L. ed. 270 (1926).

Secondly, it is argued that the majority shareholders, knowing of the authorization of the sale, should have kept themselves advised as to whether further proceedings were taken by the dissenters. (Petitioners' brief, p. 37.) The right to notice guaranteed by due process is sub-

stantial and is not satisfied by what a person *might* discover upon inquiry which he is under no obligation to make. This Court has held that even actual notice which is received extra-officially or casually is not adequate for due process.

> "Extra-official or casual notice, or a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which U. S. Const., 14th Amend., requires."
>
> *Coe* v. *Armour Fertilizer Works*, supra. (Headnote 6.)

The compliance with the requirement of notice urged here falls far short of this. There was no actual notice—extra-official, casual or otherwise. Speculation that certain action might be taken is urged as filling the requirement, but this, obviously, is not notice at all. Moreover, what we have said above is also a complete answer here—the Ohio Supreme Court has construed the statute authorizing the sale and the statute under which proceedings may be taken by dissenting shareholders as being separate and distinct.

Thirdly, it is urged that the requirement of notice may be satisfied on the ground that the board of directors represents the majority shareholders and that notice to it is notice to the majority. (Petitioners' brief, pp. 32-33.) It is elementary that the board of directors is not the representative of the shareholders as respects their *individual* rights but only in *corporate* matters, or, as it was stated in *Baltimore C. & A. Ry. Co.* v. *Godeffroy et al.*, 182 Fed. 525 (C. C. A. 4th, 1910):

> "* *; the suit being in effect one between different classes of stockholders in which the corporation is

presumptively indifferent and does not represent either class as against the other.'"

Geiger v. *American Seeding Machine Co.*, supra.
Weidenfeld v. *Northern Pacific Ry. Co.*, 129 Fed. 305 (C. C. A. 8th 1904).
McQuillen v. *National Cash Register Co.*, 22 Fed. Supp. 867 (1938).
Taylor Co. v. *Southern Pacific Co.*, 122 Fed. 147 (1903).

Especially is this so when the corporation is in liquidation and nothing remains to be done except distribute the assets to the shareholders. They and only they *as individuals* are interested in the method of distribution. Since only the individual rights of shareholders *inter se* were involved, they were themselves entitled to notice. Accordingly, notice to the corporation was not, in these circumstances, notice to the shareholders. If the dissenters receive the disproportionate shares they have demanded, the majority shareholders, and not the board or the corporation, are the ones who are deprived of their property. While we believe these principles to be sound law, they have, in any event, been declared by the Supreme Court to be the law of Ohio and will be accepted by this Court.

Fourthly, the petitioners argue that the relationship between the shareholders and the corporation is contractual; that the shareholders are presumed to know the law of Ohio; that the statutes of Ohio, specifically §8623-55, are read into the contractual relationship and by such provisions the shareholders are bound. (Petitioners' brief, pp. 45-46.) It is true that the relationship of the shareholders with the corporation and *inter se* is characterized as contractual. *Geiger v. American Seed-*

ing Machine Co., supra. The scope and extent of the contractual duties and obligations of such relationship, however, is quite another matter. It may well be doubted whether the principle has ever been extended to include situations where only the individual rights of shareholders are involved as distinguished from those where shareholders have been held to be bound by acts of the corporation, as their representative, in respect to corporate activities and transactions or to matters affecting the corporation, as such. But the nature and scope of such relationship is for determination by the Ohio Supreme Court. It has intimated, though not decided, that too broad an extension of this principle might invalidate a statute on other grounds. *Geiger v. American Seeding Machine Co.*, supra. Likewise, that Court has suggested that only statutory provisions in effect at the time of purchase of stock can become part of the contract. *Thomas v. Kalbfus, Rec'r.*, 97 O. S., 232, 239 (1918). See also: *McGarry v. Lentz*, 13 F (2d) 51 (C. C. A. Sixth, 1926). The shareholders here became such before the conclusive presumption provision of §8623-72 was enacted. The Supreme Court of Ohio has never held that the principle of contractual relationship applicable in Ohio was so broad as to include the theory that shareholders, because of contract or status, are bound by acts or omissions of the corporation under any and all circumstances—and, especially, where only their individual rights are concerned. On the contrary, that Court, in the decision below, rejected this principle which is commented on in the dissenting opinion of Judge Myers as the reason for his dissent. Six of the seven judges of the Supreme Court of Ohio have held that, in these circumstances, the corporation was not the representative of

the majority shareholders—and, in effect, that, neither by contract nor because of status, was such representation by the corporation to be found or implied. They held, in effect, that the majority shareholders had not consented in advance to being represented by the corporation in the circumstances outlined in §8623-72.

It will be observed that §8623-55, referred to by petitioners, is specifically limited to the "capacity" of the "corporation" and provides that the board of directors shall manage and conduct the "business of the corporation." Neither of these strictly corporate matters is here involved. This was clearly recognized by the Ohio Supreme Court.

There being no actual notice, any attempt to sustain due process must be on the basis of constructive or imputed notice. When §8623-65 and §8623-72 are construed separately, when it is held that individual rights are here involved and that the board of directors is not the representative of the majority shareholders under such circumstances as are here involved, and when, in effect, it is held that the majority have not consented to any different relationship—all as held by the Supreme Court of Ohio, then, we submit, this Court should conclude, as did that Court, that the majority shareholders received no notice and were accordingly denied due process.

VI.

The Majority Shareholders Had No Opportunity to Be Heard.

In the absence of notice of the demands, the majority, of course, could not act to protect their interests. But even if it be assumed that they had notice, they still were

powerless to act. They still were without opportunity to be heard.

It is urged by petitioners that during the six months' period the majority shareholders could have compelled the corporation to act, or upon its refusal to act, could have brought an action in the name of the corporation, and that the requirement of opportunity to be heard is thus satisfied. (Petitioners' brief, pp. 30-32.) In support of this argument petitioners cite authorities which hold that shareholders, where irreparable injury is threatened to the corporation and it refuses to act on demand, may bring an action in its name. This is unquestionably the law. The instances, however, in which shareholders have been accorded the right to maintain an action for a corporation have been those in which *they have had knowledge* of some danger threatening their rights and in which the corporation itself *refuses* to bring an appropriate action to prevent the threatened injury. Even in such cases there must be a showing of fraud or breach of trust by officers or directors. 14 *C. J.* 924; 13 *Am. Juris.* 504; 6 *Thompson on Corporations*, 452; 10 *O. Juris.* 343, 352, 361. Here the majority shareholders could not know that action would not be taken by the corporation until the last minute of the last hour of the last day, when it would be too late. The assumed notice of the demands would not carry with it knowledge that the corporation would not bring an action within the six months period.

The Supreme Court of Ohio, however, has properly held that the suggested procedure was not, in these circumstances, available to the majority shareholders. There is no suggestion in §8623-72 that such procedure may be followed. That Court held that the majority

shareholders, in this situation, have no standing in the courts of Ohio to maintain such an action. This is a decision on the procedural law of Ohio which, under the decisions of this Court, will be accepted by this Court. Moreover, the Ohio Supreme Court has also held, in construing §8623-72, that majority shareholders cannot maintain an action the object of which is to have the fair cash value of dissenters' shares determined, this being limited by the statute to the corporation and the dissenters. This also is a purely procedural matter governed solely by the law of Ohio. Thus, in Ohio, there was no procedure by which the majority had an opportunity to be heard.

Petitioners' reference to the intervening petition of Bertha K. Krauss (R. 67) filed in this case in the Common Pleas Court, lends no support to their contention on this point because this action was brought *after* the six months had expired. As pointed out above, she clearly could not have *intervened* within the six months' period.

VII.

Miscellaneous Points.

Principles of Statutory Construction.

The argument (petitioners' brief, p. 28) that the statutes in question should be liberally construed in favor of minority shareholders misses the point. There is no ambiguity in the statute. Hence no construction is required and that principle is not involved. The question is purely and simply one of constitutionality with the attendant requirement that every reasonable presumption in favor of constitutionality will be indulged.

It will be readily seen that this principle and the principle of liberal construction are not to be confused. They are not cumulative. The authorities cited by opposing counsel on this point have no bearing on the constitutional issue with which we are here concerned.

Practical Operation of Statute.

It is urged that, without the conclusive presumption provision, §8623-72 is unworkable, and will cause confusion. While this argument is not properly addressed to this Court, it is also untenable.

Other amendments of this section added in 1929 and in 1931 disclose that the inclusion of the conclusive presumption was unnecessary. Without it the dissenting shareholder still has the right to bring an action within the six months' period to have the fair cash value of his shares determined. In such action the fair value of his shares will be determined in a perfectly constitutional manner. There is no added burden to the corporation. The demands having been made and whether or not counter-offers are made, a suit begun within the six months' period will afford full protection. *Williams v. National Pump Corp.*, 46 O. App. 427; 188 N. E. 756 (1933); *Miller v. Canton Motor Coach, Inc.*, 58 O. App. 94; 16 N. E. (2d) 486 (1937); appeal dismissed 133 O. S. 384; 14 N. E. (2d) 15 (1938). Even if the dissenter does not bring an action within this period his rights as a shareholder are bound to be recognized and preserved. If no action is brought, the dissenter is simply relegated to his pro-rata share with the other shareholders.

There is nothing in the suggestion that the dissenting shareholders must notify the majority shareholders of

their demands. All the dissenting shareholders have to do not prevent the conclusive presumption from arising is to file their actions within the six months' period. Other difficulties suggested by petitioners which will result from the decision below are wholly imaginary. Moreover, the questions suggested as to the operation of the other provisions of §8623-72 are beside the point because the only question here involved is the validity of the conclusive presumption provision. We know, from previous decisions of Ohio courts, that the other provisions of the statute are valid, and whether there is any possible invalid operative effect other than that produced by the conclusive presumption is a question for future determination. These matters of the practical operation of the statute are all matters for the legislature and courts of Ohio and have nothing to do with the unconstitutionality of the conclusive presumption provision.

Estoppel.

Petitioners argue (pp. 37-38 of their brief) that, even if the statute in question is unconstitutional, this defense cannot be successfully urged here because respondents are estopped by their conduct to urge this defense. We have no quarrel with the cases cited on this point by petitioners, but the principle urged is not applicable here. The ingenious suggestion is made that, because the shareholders availed themselves of the provisions of §8623-65 in order to authorize the sale of the assets, coupled with the reference in that section to the relief afforded to dissenters under the provisions of §8623-72, they are now estopped to urge the unconstitutionality of the seventh unnumbered paragraph of the latter section.

In other words, it is argued that §8623-65 and §8623-72 are, in effect, one statute and having invoked the provisions relating to sale, the conduct of the majority estops them from urging the defense of unconstitutionality. As stated above, §8623-65 merely prescribes the procedure that must be followed when a corporation sells or otherwise disposes of all or substantially all of its assets. True, it refers to relief which the dissenters may have, in such circumstances, under later provisions of the code which are embodied in §8623-72. But obviously the two sections deal with entirely different subject matters—the one with sale and the other with rights of dissenters The convenient cross-reference in the former does not make them one section. They are separated by six other sections. Neither the corporation nor the majority shareholders ever invoked the provisions of §8623-72.

It is at once apparent that this entire argument is based upon statutory construction. The Supreme Court of Ohio having construed the statutes against the contention of the petitioners, the argument itself falls since this Court will not concern itself with the construction of state statutes. *Gregg Dyeing Co. v. Query,* supra; *Herbert v. Louisiana,* supra. Moreover, this argument involves a non-federal question on which the decision of the state Supreme Court (R. 81) is final. *Neblett v. Carpenter,* supra.

Res Judicata.

The attempt to invoke this doctrine is based upon the order of Judge Reynolds, in the Common Pleas Court, in sustaining a motion to strike from the files the inter-

ening petition filed by one of the majority shareholders. Petitioners' brief, p. 22.) This motion was made and he order entered as a *procedural* matter involving *parties* to the action, which was in no sense a submission of he case on the *merits*. It is elementary and is well settled in Ohio that *res judicata* is not available unless there a determination on the merits.

Hizar v. Cowan, 51 O. App. 1; 199 N. E. 196 (1935).
Detroit Fidelity & Surety Co. v. Keys, 14 O. L. A. 76 (1932).
White Estate, etc., v. Trustees, 21 O. L. A. 528, (1936).
Harding v. Talbott, 60 O. App. 523; 22 N. E. (2d) 221 (1938).

This again is plainly a question of local law relating o a procedural matter applicable to Ohio courts. It is a on-federal question with which this Court is not conerned. Again, the Ohio Supreme Court has spoken onclusively (R. 81).

CONCLUSION.

We respectfully submit that the conclusive presumption provision of §8623-72 denied the majority shareolders notice and an opportunity to be heard and that ney were accordingly denied due process. This constiutional right of the majority shareholders has been upeld by the Supreme Court of Ohio and its decision, we ubmit, should be affirmed by this Court.

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SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1940.

Olga E. Voeller, et al., Petitioners,
vs.
The Neilston Warehouse Company, et al., Respondents.

On Writ of Certiorari to the Supreme Court of Ohio.

[January 6, 1941.]

Mr. Justice Black delivered the opinion of the Court.

We granted certiorari in this case to review a decision of the Supreme Court of Ohio invalidating a state statute on the ground that it constituted a denial of procedural due process guaranteed by the Fourteenth Amendment.[1] The statute in question provided that the value placed upon his stock by a dissenting shareholder should, after six months and under certain circumstances, "conclusively be deemed to be equal to" the fair cash value.[2] The state court held that since the statute required that the demands of the dissenters be made known only to the corporation, the majority shareholders were unconstitutionally deprived of property without notice and an opportunity to be heard.

Concretely, the question was raised here in the following manner: Petitioners, holders of stock in respondent corporation, were among those who dissented when a vote was called on a sale of substantially all the corporate assets. Two-thirds of the shareholders voted for the sale, which was thereupon consummated. Petitioners gave written notice to the corporation of their objection, the number of shares they held, and the claimed fair cash value of their stock. The corporation refused in writing to pay the amount asked, but made no counter-offer. Neither party filed a petition for appraisal. After six months had elapsed, petitioners filed suit in the Court of Common Pleas, asking that judgment be rendered in their favor for the amounts originally claimed.

1 136 Ohio State 427, 26 N. E. (2d) 442.

2 Ohio Code Ann. (Throckmorton, 1940) § 8623-72, paragraph 7.

All of these proceedings were in accordance with the applicable Ohio law.[3] In their suit, petitioners relied on a section of that law which provided that the value claimed by the dissenting shareholders should "conclusively be deemed to be equal to" fair cash value if the corporation had neither made a counter-offer nor requested an appraisal.[4] One of the majority shareholders filed an intervening petition on behalf of herself and all other shareholders similarly situated, alleging that the section of the statute involved was unconstitutional. A judge of the Court of Common Pleas struck out this intervention at the request of petitioners, saying that the statute was constitutional, the petition for intervention irrelevant, and the majority shareholders without standing to intervene.[5] No appeal was taken from this ruling. When the case came on for trial on the merits, a different judge sat, and it was his opinion that the statute was unconstitutional. The Court of Appeals, one judge dissenting, reversed the trial court, and was itself reversed, two judges dissenting, by the Supreme Court of Ohio.

It was the opinion of the Supreme Court that the statute had "an unconstitutional operation against the majority stockholders, as being violative of the due process section of the Fourteenth Amendment to the federal Constitution." And the correctness of that conclusion is the only question properly before this Court. All other questions presented involve state law, for the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national Constitution.

We agree with petitioner's position that notice to the corporation of the demand for payment constituted notice to the majority stockholders, and that such notice was an adequate compliance with the constitutional requirement of due process. The objective of the Ohio statute permitting the right of appraisal to dissenting share-

[3] Ohio Code Ann. (Throckmorton, 1940) §§ 8623-65, 8623-72.

[4] The exact language is: "If such petition [for appraisal] is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

[5] The judge said: "The failure to take advantage of the statutory provisions may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty."

holders was the elimination of abuses that had long been a fixture in the field of corporate finance.[6] To assure that the right to appraisal would be promptly resorted to and to provide for the contingency that in some cases no such resort would be taken, the Ohio legislature thought it advisable to provide that under some circumstances the original offer or counter-offer should conclusively be deemed equal to the fair cash value. The corporation was given the right to avoid the effect of being compelled to pay the claimed value either by making a counter-offer or by requesting an appraisal. In addition, it was given the right to avoid both appraisal and payment of the claimed value by abandoning its original purpose to sell its assets. The dissenting shareholders could, by requesting an appraisal, likewise avoid accepting the corporation's counter-offer. Thus the corporation is compelled to pay or the dissenting shareholder to accept payment of the amount of the offer or counter-offer only if none of the many available alternatives are pursued before the expiration of a six-month period. The provisions in effect operate as statutes of limitations. After the lapse of a period of time, given defenses—attacks on value—can no longer be asserted.

It is true, as respondent urges, that after the majority authorizes the corporation to effect a sale, the alternatives are thereafter expressly open only to the corporation and the dissenters; no provision is made for notice to the majority shareholders as individuals. But the majority, by their vote approving the sale of assets, have indicated their intention to remain part and parcel of the corporation; the dissenters, on the other hand, by voting against the sale and by demanding payment, have indicated an intention to sever relationships. If thereafter the failure of the directors to make a counter-offer materially prejudices the financial stake of the majority, it is no more a want of due process to consider the majority bound

[6] At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted. See S. E. C. Report on the Work of Protective and Reorganization Committees, Part VII, pp. 557, 590. The Ohio appraisal statute here in issue was not adopted until after respondent had acquired its charter, but the Ohio Constitution expressly reserves to the state the right to alter or repeal the corporate law. Ohio Const., Art. 13, § 2.

thereby than it is to consider them bound by any other act of management. The majority are participants in a corporate enterprise. In entrusting their capital to the corporation, they accept the disadvantages of the corporate system along with its advantages. What is claimed to be a disadvantage here is a necessary concomitant of the system and its most distinctive attribute—representation of the collective interest of shareholders by selected corporate management.

The constitutional issue is here raised for the majority shareholders by the corporation, which admittedly itself had notice. Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions.[7] Yet here the corporation would have us say that it is sufficiently the representative of the majority to raise in their behalf the constitutional issue, but not sufficiently their representative to receive notice. We hold that, so far as the constitutional requirement of due process is concerned, it is in this case sufficiently their representative for both purposes, and accordingly we find it necessary to reverse the judgment below.[8]

There is nothing unusual in such a holding; the rights of parties are habitually protected in court by those who act in a representative capacity; an executor or administrator may act for the beneficiaries of an estate; a receiver may represent the collective interests of stockholders, partners, or creditors; a lawyer may appear for his clients; and a corporation may represent the collective interests of its shareholders. In this case, in fact, the unappealed ruling of the trial judge on the attempted intervention by the majority stands as an adjudication that in those respects here material the majority had committed their interests to the corporation itself.

Reversed.

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[7] Tyler *v.* Judges, 179 U. S. 405; Hendrick *v.* Maryland, 235 U. S. 610, 621. And see Mr. Justice Brandeis, concurring, in Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 347-348, and cases there cited.

[8] Christopher *v.* Brusselback, 302 U. S. 500, 504; cf. Kersh Lake Drainage District *v.* Johnson, 309 U. S. 485, 491.